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### Abused, Neglected, and Abandoned by State Juvenile Courts: The Call for Reform in Special Immigrant Juvenile Status

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# ABUSED, NEGLECTED, AND ABANDONED BY STATE JUVENILE COURTS: THE CALL FOR REFORM IN SPECIAL IMMIGRANT JUVENILE STATUS

## I. INTRODUCTION

Abused, neglected, and abandoned, two natives of Guadalajara, ages five and seven, began their journey to the United States.<sup>1</sup> Just two years prior, the boys' father abandoned them to travel to the United States, while the boys remained with their mother, a drug dealer, and stepfather who routinely beat them with extension cords, belts, and anything else that he could get his hands on. While the boys did not endure abuse from their mother, she failed to protect them from the harsh treatment of their stepfather. The boys were only allowed to leave when their mother and stepfather were killed by a rival drug gang. As a result, the boys took the treacherous journey to the United States—hitchhiking, riding with strangers, and no adult supervision.

The boys were captured at the United States-Mexico border, kept in a Texas juvenile facility for three months, and then released into their biological father's custody, who lived in Nebraska. After several months, the boys petitioned the Nebraska Family Court for special findings to apply for Special Immigrant Juvenile Status ("SIJS"), which is a remedy available to abused, abandoned, and neglected children, but their petition was denied.<sup>2</sup> However, if the boys were in New York, the outcome would have been different and they would be granted a juvenile court order in support of SIJS.<sup>3</sup> If the undocumented child receives SIJS, he or she will be able to transfer SIJS to receive legal permanent resident status in the United States.<sup>4</sup>

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<sup>1</sup> The following is a fictional work created by the author solely for the purpose of this Note.

<sup>2</sup> See *infra* Part II.D.2 (reviewing *In re Erick M.*, a Nebraska Supreme Court decision that denied a teenage boy's motion for SIJS approval for failure to prove that his request was *bona fide*); see also Emily Rose Gonzalez, *Battered Immigrant Youth Take the Beat: Special Immigrant Juveniles Permitted to Age-Out of Status*, 8 SEATTLE J. SOC. JUS. 409, 410 (2009) (revealing that SIJS was created to give legal citizenship to abandoned, abused, and neglected children).

<sup>3</sup> See *infra* Part II.C (describing current SIJS statutory requirements).

<sup>4</sup> See ANGIE JUNCK ET AL., SPECIAL IMMIGRANT JUVENILE STATUS AND OTHER IMMIGRATION OPTIONS FOR CHILDREN AND YOUTH 3-10-3-11 (3d ed. 2010) (demonstrating that the greatest benefit of SIJS is obtaining legal permanent resident status, also known as a green card, which allows recipients to live and work permanently in the United States, to travel in and out of the country, protection against deportation, and employment authorization). There are dangers associated with SIJS, such as having the SIJS petition denied which alerts U.S. immigration officials that the child is in the United States "illegally." *Id.* at 3-11.

During the summer of 2014, there were approximately 60,000 unaccompanied children who entered the United States by crossing the United States-Mexico border.<sup>5</sup> An unaccompanied child is defined as a child without lawful status in the United States, under the age of eighteen, and has no parent or legal guardian in the United States that is able to provide essential care and physical custody for that child.<sup>6</sup> The nationalist response to massive influxes of unaccompanied children is that “they are illegal” and should be deported; however, before deportation, there is an opportunity for a child to receive SIJS if he or she can prove to be abused, abandoned, or neglected.<sup>7</sup>

In order to successfully complete the entire SIJS process, the child must prevail over substantial procedural hurdles.<sup>8</sup> First, the child must

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<sup>5</sup> See Steve Chapman, *When Kids Come Over the Border*, CHI. TRIB. (July 6, 2014), [http://articles.chicagotribune.com/2014-07-06/news/ct-oped-chapman-0706-20140706\\_1-human-trafficking-unaccompanied-children-foreigners](http://articles.chicagotribune.com/2014-07-06/news/ct-oped-chapman-0706-20140706_1-human-trafficking-unaccompanied-children-foreigners) [<http://perma.cc/3PNR-Y2YQ>] (unraveling America’s fear in having thousands of undocumented youth in the United States); Julie Hirschfeld Davis & Michael D. Shear, *57,000 Reasons Immigration Overhaul May Be Stalled For Now*, N.Y. TIMES (July 16, 2014), [http://www.nytimes.com/2014/07/17/us/politics/border-crisis-casts-shadow-over-obamas-immigration-plan.html?\\_r=0](http://www.nytimes.com/2014/07/17/us/politics/border-crisis-casts-shadow-over-obamas-immigration-plan.html?_r=0) [<http://perma.cc/6F59-7WXL>] (analyzing President Obama’s proposal to allow more immigrants into the country, which may be halted as more undocumented children arrive in the United States).

<sup>6</sup> JUNCK ET AL., *supra* note 4, at 1-15. Junck states:

There are many unresolved issues around the “unaccompanied minor” classification including the jurisdiction to make and review such a decision, interpretation of the unaccompanied definition by federal agencies, the process and timing of such a determination, and rescission of TVPRA benefits if an unaccompanied classification is subsequently revoked.

*Id.* Agencies have the authority to make determinations for who qualifies as unaccompanied. *Id.*

<sup>7</sup> See Devon A. Corneal, *On the Way to Grandmother’s House: Is U.S. Immigration Policy More Dangerous than the Big Bad Wolf for Unaccompanied Juvenile Aliens?*, 109 PENN. ST. L. REV. 609, 619 (2004) (explaining deportation, which is now referred to as a removal proceeding); Rachel Lienesch, *Almost Half of Americans Want Undocumented Kids Deported Right Away*, HUFF. POST (July 16, 2014), [http://www.huffingtonpost.com/2014/07/16/immigration-poll\\_n\\_5589010.html](http://www.huffingtonpost.com/2014/07/16/immigration-poll_n_5589010.html) [<http://perma.cc/24QW-ELDL>] (explaining American anti-immigration sentiments). Many Americans believe that the increase in undocumented children fleeing to the United States is not due to crime or unsafe conditions in their native countries, but a hope to be granted amnesty by the American government. Lienesch, *supra* note 7.

<sup>8</sup> See 8 U.S.C. § 1101(a)(27)(J)(i)–(ii) (2012) (enumerating the eligibility requirements to obtain SIJS); see also Jennifer Baum et al., *Most in Need but Least Served: Legal and Practical Barriers to Special Immigrant Status*, 50 FAM. CT. REV. 621, 621 (2012) (conveying the types of barriers for children seeking SIJS); Angie Junck, *Special Immigrant Juvenile Status: Relief for Neglected, Abused, and Abandoned Undocumented Children*, 63 JUV. AND FAM. CT. J. 48, 61–62 (2012) (advocating for child representatives to minimize the procedural hurdles for undocumented children seeking relief).

receive “special findings” from the juvenile court.<sup>9</sup> Only then can the child apply for SIJS through the U.S. Citizenship and Immigration Services (“USCIS”).<sup>10</sup> After receiving “special findings,” the child is able to petition the government to obtain legal permanent residency status.<sup>11</sup>

In addition to the procedural hurdles, the SIJS statute creates a bifurcated process between the state and federal government.<sup>12</sup> Although immigration is a federal issue, states are allowed to regulate child welfare and are responsible for making preliminary determinations for SIJS eligibility.<sup>13</sup> Most recently, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPPRA 2008”) provided an amended definition of SIJS that allows children who may not be reunited with one or more parent to be eligible for the remedy.<sup>14</sup> However, states

<sup>9</sup> Baum et al., *supra* note 8, at 622. There are other instances where a child may petition the USCIS for SIJS, such as being in Immigration and Naturalization Services (“INS”) custody. Gregory Zhong Tian Chen, *Eliau or Alien? The Contradictions of Protecting Undocumented Children under the Special Immigrant Juvenile Statute*, 27 HASTINGS CONST. L.Q. 597, 607 (2000). However, once in INS custody, state juvenile courts are no longer able to gain jurisdiction over that child. *Id.* at 613. As a result, these children are often denied SIJS. *Id.* In 1998, Congress clarified its intent for SIJS to apply to all abused, neglected, and abandoned undocumented children. Dep’t of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriates Act, Pub. L. No. 105-119, § 113, 111 Stat. 2440 (1997).

<sup>10</sup> See Angela Lloyd, *Regulating Consent: Protecting Undocumented Immigrant Children from Their (Evil) Step-Uncle Sam, or How to Ameliorate the Impact of the 1997 Amendments to the SIJ Law*, 15 B.U. PUB. INT. L.J. 237, 238-39 n.10 (2006) (defining the USCIS’ role in the SIJS process). The Homeland Security Act of 2002 divided the Immigration and Nationality Service into two distinct agencies with the purpose of creating a separation of powers in the INS. Pub. L. No. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. § 101 et. seq.). The USCIS is responsible for handling immigration benefits, while the Immigration and Customs Enforcement Agency is responsible for border control and enforcement issues. *Id.*

<sup>11</sup> See Jared Ryan Anderson, *Yearning to be Free: Advancing the Rights of Undocumented Children Through the Improvement of the Special Immigrant Juvenile (SIJ) Status Procedure*, 16 ST. MARY’S L. REV. 659, 668-69 (2014) (examining the complexities of the SIJS process).

<sup>12</sup> See *infra* Part II (weighing the bifurcation of the SIJS process).

<sup>13</sup> See Bridgette A. Carr, *Incorporating a “Best Interests of the Child” Approach Into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 124 (2009) (observing the jurisdictional splits in the current “best interest of the child” approach); *infra* Part II.A (analyzing the Immigration Act of 1990, which is the beginning of SIJS).

<sup>14</sup> H.R. 7311, 110th Cong. (2008). The statute reads as follows:

(1) IN GENERAL.—Section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)) is amended—  
(A) in clause (i), by striking “State and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment;” and inserting “State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with one or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.”

*Id.* See *infra* Part II.D (recognizing the current controversy created by TVPPRA 2008’s change in the SIJS statutory language).

## 188 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 50]

differ on SIJS statutory interpretation.<sup>15</sup> The current state juvenile court's discretion in interpreting the SIJS statute results in outcome disparities between similarly situated children, which is contrary to the role of the state in determining the best interests of the child.<sup>16</sup>

This Note examines the differing interpretations of SIJS petitions and the injustice that is placed on children.<sup>17</sup> First, Part II describes the implementation of SIJS with respect to the amendments occurring since its enactment.<sup>18</sup> Second, Part III analyzes the differing approaches that state juvenile courts take in interpreting the SIJS statute, while evaluating the adequacy of those approaches in light of the plain meaning rule and unwarranted disparities that result for similarly situated children.<sup>19</sup> Finally, Part IV proposes an amendment to the SIJS statute, which gives concrete definitions and further clarification of ambiguous terms to create uniformity in the SIJS statute application at the state level.<sup>20</sup>

## II. BACKGROUND

Until recently, the number of undocumented children within the United States went unnoticed; however, "illegal" immigration from the southern border has long been a problem in the United States.<sup>21</sup> SIJS is a

<sup>15</sup> See *infra* Part III.C (observing that J.E., J.C., and Erick were children in the custody of their mothers; however, Nebraska decided that Erick could not obtain SIJS); see, e.g., *H.S.P. v. J.K.*, 87 A.3d 255, 269 (N.J. Super. Ct. App. Div. 2014) (holding that the 2008 amendments to the SIJS statute did not alter the intent of the 1997 federal law, which limited eligible SIJS applicants to those with *bona fide* claims).

<sup>16</sup> See *infra* Part II.C (noting the changes to the SIJS statute with respect to the complexities in statutory interpretation among the states). See also David B. Thronson, *You Can't Get Here from Here*, 14 VA. J. SOC. POL'Y L. 58, 61 (2006) (explaining the issues that immigrant children face as a result of their parents' choice to migrate to the United States). These children are burdened by the shifting nature of immigration laws and are unable to find security or stability to build a future. *Id.* at 66-67. These complexities should be considered to develop a child-centered approach in determining SIJS eligibility. *Id.* at 61.

<sup>17</sup> See *infra* Part II.D.2 (explaining the outcome disparities for children when petitioning the juvenile court for special findings).

<sup>18</sup> See *infra* Part II (discussing the implementation of SIJS with respect to the amendments that shifted the purpose of SIJS).

<sup>19</sup> See *infra* Part III (analyzing differing interpretations with some courts' reliance on legislative history).

<sup>20</sup> See *infra* Part IV (proposing an amendment to the current SIJS statute).

<sup>21</sup> See Tamar Diana Wilson, *Anti-Immigrant Sentiment and the Problem of Reproduction/Maintenance in Mexican Immigration to the United States*, 20 CRITIQUE OF ANTHROPOLOGY 191, 199 (2000) (explaining the attraction of U.S. social capita amongst relatives and friends of immigrants that have migrated to the United States); Jamelle Bouie, *America's Long History of Immigrant Scaremongering*, SLATE.COM (July 18, 2014), [http://www.slate.com/articles/news\\_and\\_politics/politics/2014/07/immigrant\\_scaremongering\\_and\\_hate\\_conservatives\\_stoke\\_fears\\_of\\_diseased.html](http://www.slate.com/articles/news_and_politics/politics/2014/07/immigrant_scaremongering_and_hate_conservatives_stoke_fears_of_diseased.html) [http://perma.cc/UJ2W-D7CW] (reviewing the tradition of conservative political figures using disease and public

form of relief for undocumented children that was available for just over two decades.<sup>22</sup> Because national security is a federal issue and child welfare is a state issue, the SIJS statute utilizes a bifurcated system.<sup>23</sup> However, this dual relationship creates confusion, outcome disparities, and a lack of empathy for the children in need of the SIJS remedy.<sup>24</sup>

Part II.A introduces Section 153 of the Immigration Act of 1990.<sup>25</sup> Next, Part II.B gives an in-depth history of Section 113 of the Immigration Act of 1997, which accounts for the current differing interpretations.<sup>26</sup> Then, Part II.C introduces TVPRA 2008 and the resulting changes to SIJS.<sup>27</sup> Finally, Part II.D analyzes the current controversy in state SIJS interpretation with respect to the outcome disparities for similarly situated children.<sup>28</sup>

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health risk tactics to stir up anti-immigration sentiment); Lauren Fox, *Anti-Immigrant Hate Coming From Everyday Americans*, U.S. NEWS & WORLD REP. (July 24, 2014), <http://www.usnews.com/news/articles/2014/07/24/anti-immigrant-hate-coming-from-everyday-americans> [<http://perma.cc/9B5L-CPV7>] (rendering that the frustration with the current immigration system is not coming from hate groups but U.S. citizens). Citizens are particularly concerned that new immigration detention centers will be placed in their communities since the government stated an intent to create new centers away from the border. Fox, *supra* note 21.

<sup>22</sup> See Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978 (codified at 8 U.S.C. § 1101(a)(27)(J) (2012)) (defining the first SIJS regulations). Because SIJS is relatively new, SIJS continues to be underutilized. Kristen Jackson, *Special Status Seekers: Through the Underused SIJS Process, Immigrant Juveniles May Obtain Legal Status*, LOS ANGELES LAWYER 20, 22 (2012), <http://www.lacba.org/Files/LAL/Vol34No11/2893.pdf> [<http://perma.cc/RE3V-4LFJ>]. In 2010, out of 1,042,625 people that became lawful permanent residents of the United States, only 1492 children gained residency through the SIJS remedy, which is less than one percent. *Id.*

<sup>23</sup> See U.S. CONST. art. I, § 8 (vesting Congress with the power to “provide for the common Defense and general Welfare of the United States”). Training, maintaining, and organizing the navy, militia, and armed forces are included in the scope of legislative power. *Id.* See U.S. CONST. art. II, § 2 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States.”); *Reno v. Flores*, 507 U.S. 292, 303 (1993) (recounting the state’s interest in promoting child welfare); *Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (acknowledging the states’ “*parens patriae* interest in preserving and promoting the welfare of the child”); *Lassiter v. Dep’t of Soc. Serv.*, 452 U.S. 18, 27 (1981) (clarifying that states have an “urgent” interest in child welfare).

<sup>24</sup> See *infra* Part II.D.2 (addressing the disparities in SIJS “special findings” determinations at the juvenile court). See also *In re Israel O.*, 233 Cal. App. 4th 279, 291 (1st Dist. 2015) (reversing and remanding a juvenile court’s order denying Israel’s request for SIJS).

<sup>25</sup> See *infra* Part II.A (introducing the SIJS statute as an advancement to children and the law).

<sup>26</sup> See *infra* Part II.B (introducing the SIJS amendment of 1997).

<sup>27</sup> See *infra* Part II.C (introducing TVPRA 2008, which broadened the pool of applicants eligible for SIJS).

<sup>28</sup> See *infra* Part II.D (describing the bifurcation of SIJS). Some courts make determinations beyond the scope of the SIJ statute; however, “[t]he ‘state court’s role in the SIJ process is not to determine worthy candidates for citizenship, but simply to identify abused, neglected, or abandoned alien children under its jurisdiction who cannot reunify with a parent or be safely

190 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 50]

A. *The Creation of Special Immigrant Juvenile Status: Immigration Act of 1990, Section 153*

In 1952, the Immigration and Nationality Act (“INA” or “Act”) placed the first restrictions on migration into the United States through the United States-Mexico border.<sup>29</sup> Though there were many changes to the Act, the Act did not differentiate between undocumented children and undocumented adults.<sup>30</sup> During this time, undocumented children remained in state care until their undocumented parents came forward.<sup>31</sup> There were few remedies available to undocumented children before SIJS, but there was asylum.<sup>32</sup> Asylum is a remedy available to adult and child refugees who fear persecution on “account of race, religion, nationality,

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returned in their best interest to their home country.” *Simbaina v. Bunay*, 109 A.3d 191, 202 (Md. Ct. Spec. App. 2015) (quoting *Leslie H. v. Cal. Sup. Ct.*, 168 Cal. Rptr. 3d 729, 737 (Cal. Ct. App. 2014)).

<sup>29</sup> Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. (2012)). INA 1990 increased the numerical limitation (quota) of the number of immigrants who could legally immigrate to the United States by thirty-five percent. Charles C. Foster, *The New Immigration Act of 1990: Major Reform of Legal Immigration*, 28 HOUS. LAWYER 26-27 (Feb. 1991). Additionally, INA 1990 increased the number of visas available to spouses and children of immigrants with certain status in the United States, and provided a numerical immigrant quota for underrepresented countries. *Id.* at 29-30.

<sup>30</sup> See generally Immigration and Nationality Act of 1965, Pub. L. 89-236, 79 Stat. 911 (1965) (abolishing the national quota system that was in play since the 1920s as a result of the Emergency Quota Act, and replaced it with a system that preferred skilled immigrants); Immigration and Reform Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (1986) (giving undocumented aliens the opportunity to gain legal status into the U.S.); Katherine Porter, *In the Best Interests of the INS: An Analysis of the 1997 Amendment to the Special Immigrant Juvenile Law*, 27 J. LEGIS. 441, 443 (2001) (revealing that INA 1986’s “benefits were severely restricted to only a limited number of aliens who had been in the United States before 1982”); see also M. Beth Morales Singh, *To Rescue, Not Return: An International Human Rights Approach to Protecting Child Economic Migrants Seeking Refuge in the United States*, 41 COLUM. J.L. & SOC. PROBS. 511, 526 (2008) (addressing some of the issues with children seeking refuge in the United States).

<sup>31</sup> See JUNCK ET AL., *supra* note 4, at 4-1 (explaining the considerations involved when undocumented parents come forward to claim their undocumented children); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909) (advocating for appropriate legal distinctions between children and adults).

<sup>32</sup> See 8 C.F.R. § 208.13 (2013) (presenting the current asylum eligibility requirements). The 1967 Protocol Relating to the Status of Refugees created asylum by stating:

[T]he United States is bound not to return to his or her home country any individual who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion,” is outside of the country of the individual’s nationality and is “unable or, owing to such fear, unwilling to avail” himself or herself of the protection of the home country.

Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved But Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 7 (2001).

membership in a particular social group, or political opinion[.]”<sup>33</sup> However, there was no distinction made between adult and children refugees.<sup>34</sup>

Section 153 of the Immigration Act of 1990 (“SIJS 1990”) recognized the issue that asylum posed to undocumented children by allowing children who were victims of abuse, abandonment, or neglect the opportunity to receive lawful permanent residency status.<sup>35</sup> For SIJS eligibility in 1990: (1) there had to be a court dependency order; (2) the immigrant child had to be deemed eligible for long-term foster care; and (3) it had to be in the child’s best interest not to be returned to the child’s country of nationality.<sup>36</sup> If the child welfare system and the state juvenile

<sup>33</sup> 8 C.F.R. § 208.13 (2013). See *In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 358–60 (BIA 1996) (granting a nineteen year old woman’s request for asylum due to fear that she would endure female genital mutilation upon marrying the man selected by her father); Maura M. Ooi, *Unaccompanied Should Not Mean Unprotected: The Inadequacies of Relief for Unaccompanied Immigrant Minors*, 25 GEO. IMMIGR. L.J. 883, 889 (2011) (discussing TVPRA 2008’s improvement to asylum); Peter J. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 39 (1984) (defining refugees as “individuals displaced from their homes and countries by convulsive events such as civil war, persecution, natural disaster, and unimaginable destitution”); *What is Asylum?*, FREE ADVICE, [http://immigration-law.freeadvice.com/immigration-law/asylum/what\\_is\\_asylum.htm](http://immigration-law.freeadvice.com/immigration-law/asylum/what_is_asylum.htm) [<http://perma.cc/D849-YRQN>] (relaying that asylum petitioners are seeking relief from deportation due to entering the United States undocumented).

<sup>34</sup> See Jacqueline Bhabha, “*Not a Sack of Potatoes*”: *Moving and Removing Children Across Borders*, 15 B.U. PUB. INT. L.J. 197, 199 (2006) (reporting that children seeking asylum were viewed as independent agents who made the choice to migrate); Rachel Bien, *Nothing to Declare But Their Childhood: Reforming U.S. Asylum Law to Protect the Rights of Children*, 12 J.L. & POL’Y 797, 816 (2004) (observing that asylum law did not distinguish between children and adults); Crystal Estrada, *Misperceived Child Testimony: Why Credibility Should Be Presumed for Unaccompanied and Separated Children Seeking Asylum*, 31 T. JEFFERSON L. REV. 121, 125–26 (2008) (insisting that U.S. asylum law fails to address persecution from a child’s perspective).

<sup>35</sup> Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978. Though INA 1990 provided rights for undocumented children, it also had a political agenda:

[T]he naturalization statute long required that a noncitizen be “attached to constitutional principles,” a requirement that was invoked to bar naturalization of lawful permanent residents who are conscientious objectors to military service and Jehovah’s Witnesses who object to voting, participating in politics, and serving on juries.

KEVIN R. JOHNSON & BERNARD TRUJILLO, *IMMIGRATION LAW AND THE U.S.-MEXICO BORDER: ¿SÍ SE PUEDE?* 56 (2011). See also *Price v. INS*, 962 F.2d 836, 844 (9th Cir. 1991) (affirming a lower court decision that denied a man’s naturalization petition because he was previously involved with the Communist party). The man appealed the decision arguing that his First Amendment rights were violated, but the court held that all statutory requirements must be met before attaining naturalization rights. *Id.* at 837.

<sup>36</sup> Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978. See generally My Xuan T. Mai, *Children Under the Radar: The Unique Plight of Special Immigrant Juveniles*, 12 BARRY L. REV. 241, 244–45 (2009) (examining the INA 1990 SIJS requirements and evolution). In addition to the court determinations, a child seeking SIJS “was required to submit a Form I-360 along with an I-485 application for adjustment of status.” *Id.* at 245.



## 192 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 50]

court concluded that the juvenile required government protection, then the court could declare the juvenile a dependent of the court.<sup>37</sup> Additionally, SIJS 1990 gave the USCIS the exclusive right to make decisions on naturalization applications.<sup>38</sup>

Issues quickly arose with SIJS 1990 because there were no provisions to ensure that a child granted SIJS could later receive legal permanent resident status, and the bifurcation between the federal and state government in the SIJS process was not thoroughly explained.<sup>39</sup> Congress addressed the first issue by removing the bars of admissibility, which allowed minors to adjust their status to legal permanent residency.<sup>40</sup> To address the intent of bifurcating the SIJS process between the state and federal government, Congress expressly stated its intent for the state juvenile court to determine the best interests of the child.<sup>41</sup> At this time, the SIJS statutory language was vague, resulting in abuse by visiting college students from other countries.<sup>42</sup> As a result, the 1997 SIJS

<sup>37</sup> See 8 U.S.C. § 1101(a)(27)(J)(i) (2012); Chen, *supra* note 9, at 608 (declaring that the juvenile courts' role is substantive in determining whether the factual underlinings support a "special findings" court order to petition the USCIS for SIJS). Also, this juvenile court order makes the child dependent on the juvenile court. Chen, *supra* note 9, at 608.

<sup>38</sup> See RACHEL GONZALEZ SETTLAGÉ ET AL., IMMIGRATION RELIEF: LEGAL ASSISTANCE FOR NONCITIZEN CRIME VICTIMS 72 (2014) (discussing the role of the USCIS in determining the child's legal immigration status).

<sup>39</sup> See *Miscellaneous and Technical Immigration and Naturalization Amendments of 1991*, Pub. L. 102-232, 105 Stat. 1733 (removing the adjustment requirement for SIJS grantees to meet Section 245 of the Immigration Act of 1990); Special Immigrant Status, 58 Fed. Reg. 42844 (Aug. 12, 1993) (asserting that many SIJS grantees were denied lawful permanent residency status because they were unable to meet the statutory requirements for immigrant visa's or adjustment status); *Bifurcate*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining bifurcate as to separate into two parts, especially for convenience).

<sup>40</sup> See Special Immigrant Status, 58 Fed. Reg. at 42844 (noting congressional intent to alleviate many of the hardships associated with SIJS 1990). SIJS 1990 merely prevented deportation for SIJS grantees, but did not allow the temporary status to transition into lawful permanent residency. *Id.* "The technical amendments made clear that 'for the purpose of applying for adjustment of status as a special immigrant juvenile . . . these juveniles will be treated as if they had been paroled into the United States.'" Lloyd, *supra* note 10, at 242-43 (quoting Special Immigrant Status, Certain Aliens Declared Dependent on a Juvenile Court, 58 Fed. Reg. 42843, 42849 (Aug. 12, 1993)).

<sup>41</sup> Special Immigrant Status, 58 Fed. Reg. at 42847. The final statute granted juvenile courts and state or local social agencies the power to determine the best interests of the child. *Id.* Congress did not intend to put burdensome and impractical tasks on juvenile courts, such as re-adjudicating the best interest determinations. *Id.* These tasks would only delay relief for children in need of lawful permanent residency. *Id.*

<sup>42</sup> See *Yeboah v. U.S. Dep't of Justice*, 345 F.3d 216, 221 (3rd Cir. 2003) (reporting abuse of the SIJS remedy by visiting college students); Mai, *supra* note 36, at 246 (investigating the evolution of SIJS law); *supra* Part II.A (evaluating SIJS 1990 and its infancy). The leaders of the visiting students' native countries encouraged the U.S. Attorney General to investigate the fraud in the SIJS applications from these students. Mai, *supra* note 36, at 246. For example, "New Mexico Senator Pete Domenici stated that there 'is a giant

amendments limited the number of children eligible for SIJS and placed procedural hurdles for the children currently enduring SIJS proceedings.<sup>43</sup>

*B. Immigration Act of 1997: Congress' Response to the Abuse of Available Remedies*

The Immigration Act of 1997, Section 113 ("1997 SIJS Amendment") altered the course of SIJS applications.<sup>44</sup> Some state courts and the USCIS still rely on the restricting language of the 1997 amendments to deny SIJS petitions from children who may qualify for SIJS under the new amendments.<sup>45</sup> The 1997 SIJS Amendment required the child petitioning for SIJS to be eligible for long-term foster care due to abuse, neglect, or abandonment, and the SIJS applicant had to receive the consent of the Attorney General.<sup>46</sup>

The consent requirement can be further divided into two categories: express consent and specific consent.<sup>47</sup> Express consent is prevalent in cases where the juvenile is not in the custody of the Attorney General and

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loophole . . . [e]very visiting student from overseas can have a petition filed in a state court . . . declaring that they're a ward and in need of foster care.'" *Id.*

<sup>43</sup> See, e.g., *Gao v. Jenifer*, 185 F.3d 548, 555 (6th Cir. 1999) (holding that the Ingham County probate court had jurisdiction to declare Gao dependent on the state of Michigan while in INS legal custody). Gao was born in China and entered the United States illegally and unaccompanied. *Id.* at 551. Because of the 1997 SIJS Amendment's attempt to expressly state the separation of federal and state roles in the SIJS process, children seeking SIJS had a higher burden of proof. *Id.*

<sup>44</sup> See *supra* Part III (debating current state court and USCIS reliance on legislative history).

<sup>45</sup> See Anderson, *supra* note 11, at 673 (analyzing the impact of the 1997 administrative hurdles). These procedural hurdles were implemented to target visiting college students seeking SIJS to "circumvent immigration procedures." *Id.* at 670.

<sup>46</sup> Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, § 113, 111 Stat. 2440 (1997); see *Yu v. Brown*, 92 F. Supp. 2d 1236, 1246 (D.N.M. 2000) ("The 1990 definition of Special Immigrant Juvenile contained no requirements that the juvenile be abandoned, neglected or abused."); Anderson, *supra* note 11, at 671 (scrutinizing the added requirements of the SIJS 1997 amendments). The first of the new requirements placed a burden on all SIJS petitioners "requir[ing] some children to navigate through the foster care system for up to eighteen months." Anderson, *supra* note 11, at 671. This provision also created the hotly contested "aging out" problem, as many SIJS petitioners would "age-out" of the juvenile system before obtaining SIJS approval. *Id.* The added requirement of consent caused many issues for SIJS petitioners because immigration officials could deny a SIJS application without little or any justification. Ooi, *supra* note 33, at 890. As one scholar notes, the consent requirement is a "procedural hurdle" and "an arbitrary process with little basis in understandings of child welfare." *Id.*

<sup>47</sup> See Carlos Lopez, *In re Zaim R.*, 52 N.Y. L. SCH. L. REV. 459, 460-61 (2008) (advocating for a narrow construction of "constructive custody" to ensure consent for children in INS custody).

194 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 50]

where the juvenile court issues a dependency order.<sup>48</sup> Specific consent is an issue “in cases where the juvenile is in the actual or constructive custody of the attorney general.”<sup>49</sup> In order for the SIJS application to be approved, the applicant had to receive at least one form of express or specific consent.<sup>50</sup>

Shortly after enacting the 1997 SIJS Amendment, Congress issued a report clarifying its intent in amending the statute.<sup>51</sup> The congressional report expressed disdain for the abuse of SIJS stating:

The language has been modified in order to limit the beneficiaries of this provision to those juveniles for whom it was created, namely abandoned, neglected, or abused children, by requiring the Attorney General to determine that neither the dependency order nor the administrative or judicial determination of the alien’s best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect.<sup>52</sup>

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<sup>48</sup> See *id.* at 460 (describing the SIJS consent requirements). Express consent from the attorney general was a part of INA 1990; however, the 1997 SIJS Amendment changes “made the attorney general’s exclusive authority to grant SIJ status clearer.” *Id.* at 461.

<sup>49</sup> *Id.* If the juvenile is in the actual or constructive custody of the attorney general, “state court dependency orders are null and void unless the attorney general has specifically consented to the jurisdiction of the state court prior to the issuance of the order.” *Id.* Before the 1997 SIJS Amendment, state court dependency orders were valid without the Attorney General’s specific consent. *Id.* The obstacle within this change was that juveniles who did not obtain the “specific consent” of the attorney general were not allowed to prove abuse, abandonment, or neglect before the juvenile state court, which is key to obtaining SIJS approval. Lopez, *supra* note 47, at 461.

<sup>50</sup> Dep’ts of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, § 113, 111 Stat. 2440 (1997); see Ooi, *supra* note 33, at 890 (discussing the impact of the SIJS requirements).

<sup>51</sup> See Lloyd, *supra* note 10, at 259 (evaluating the obstacles of 1997 SIJS Amendment). “The memoranda thus called for the agency to make independent determinations of a juvenile applicant’s dependency status: this effectively required the agency ‘to routinely readjudicate judicial or social service agency administrative determinations’ in contravention of the agency’s own stated preference for deferring to state agency decisions.” *Id.* (quoting 58 Fed. Reg. 42847 (1993)).

<sup>52</sup> See H.R. REP. NO. 105-405, at 130 (1997) [hereinafter 1997 CONGRESSIONAL REPORT] (expressing the political concern for SIJS given the time period); Memorandum from the USCIS on Recommendation 47, Special Immigrant Juvenile (SIJ) Adjudications 4 (July 13, 2011), <http://www.uscis.gov/sites/default/files/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Formal%20Recommendations/cisomb-2011-response47.pdf> [http://perma.cc/7BXV-BXAL] (“The consent function is essentially a discretionary determination that the petition is *bona fide* and that there is a reasonable basis for the agency’s

The issue of ensuring a “*bona fide*” SIJS petition is not a formal requirement for the SIJS statute, but instead a fear of granting SIJS too freely.<sup>53</sup> This congressional report demonstrates an intent to limit the number of children eligible for SIJS.<sup>54</sup> Seven years later, William Yates, Associate Director for Operations of the USCIS, relied on this congressional report to support a narrow SIJS statute interpretation stating “express consent is an acknowledgement that the request for SIJ classification is *bona fide*.”<sup>55</sup>

C. *Modern Statutory Amendments to SIJS: The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*

In 2000, the Trafficking Victims Protection Act began as a human trafficking legislative initiative to help child victims.<sup>56</sup> SIJS became a temporary residency status for child sex victims because the victims were required to receive adjustment of status for legal permanent residency.<sup>57</sup>

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consent to the SIJ classification”). A juvenile court order stating the basis of “special findings” due to abuse, neglect, or abandonment is allegedly sufficient enough to warrant consent from the Attorney General. Memorandum from the USCIS on Recommendation 47.

<sup>53</sup> See Lloyd, *supra* note 10, at 244 (reporting that Senator Pete Domenici of Arizona proposed heightening the SIJS requirements due to the belief that older Mexican teenagers were applying for the remedy simply to attend college in the United States); Memorandum from Safe Passage Project for the House Judiciary Committee (Mar. 2, 2015) (on file with the author) (observing that SIJS is one of the most underutilized immigration remedies with under 4000 petitions filed in 2013); *infra* Part II.D (describing Nebraska’s current interpretation of SIJS with reliance on the 1997 Congressional Report).

<sup>54</sup> See also Sally Terry Green, *Protection for Victims of Child Sex Trafficking in the United States: Forging the Gap Between U.S. Immigration Laws and Human Trafficking Laws*, 12 U.C. DAVIS J. JUV. L. & POL’Y 309, 342–44 (2008) (expounding that the SIJS 1997 amendments created controversies instead of remedies).

<sup>55</sup> Memorandum from William Yates, Assoc. Dir. for Ops., U.S. Dep’t of Homeland Sec., U.S. Citizenship & Imm. Servs., at 2 (May 27, 2004), [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/Archives%201998-2008/2004/sij\\_memo\\_052704.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/sij_memo_052704.pdf) [<http://perma.cc/R76X-U6BH>] [hereinafter Yates]. See also Memorandum from Donald Neufeld from the USCIS, Acting Assoc. Dir. For Dom. Ops., U.S. Dep’t of Homeland Sec., U.S. Citizenship & Imm. Servs., at 3 (Mar. 24, 2009), [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/2009/TVPRA\\_SIJ.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf) [<http://perma.cc/7CP9-A8J9>] (restating the 1997 logic despite the TVPRA 2008 Amendment). Of particular importance is the *bona fide* claim reliance that says “[t]his means that the SIJ benefit was not ‘sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect or abandonment.’” *Id.* (quoting H.R. REP. NO. 105-405, at 130 (1997)).

<sup>56</sup> See Victims of Trafficking and Violence Protection Act of 2000 (TVPA), Pub. L. No. 106-386, 114 Stat. 1464 (codified in 22 U.S.C. § 7101 (2012)) (purporting to protect child victims of human trafficking); Green, *supra* note 54, at 313 (explaining that “congressional sponsors coined the ‘three Ps’—prosecution, prevention and protection—as representative of the legislature’s intent.”).

<sup>57</sup> See Green, *supra* note 54, at 344 (articulating that the purpose of the SIJS statute was to allow children to adjust their status to lawful permanent residency).

In December 2008, the TVPRA 2008 was passed and signed into law.<sup>58</sup> The TVPRA 2008 requires mandatory screening for children caught by border patrol to determine if the child is a victim of trafficking or any other serious crime that puts the child's life in danger.<sup>59</sup> Prior to the enactment of TVPRA 2008, Immigration and Customs Officers gave consent for state juvenile courts to exercise jurisdiction over the child's dependency determination.<sup>60</sup> The amendment designated the U.S. Department of Health and Human Services to consent to the exercise of state jurisdiction.<sup>61</sup> TVPRA 2008 addressed many shortcomings of SIJS, such as the "aging-out" issue by "mandate[ing] the expeditious adjudication of Special Immigrant Juvenile applications, requiring that the Secretary of Homeland Security process these applications within 180 days after the application is filed."<sup>62</sup> Further, the amendment removed the SIJS filing fee, and as a result, increased the number of applicants applying for SIJS.<sup>63</sup>

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<sup>58</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044. The primary purpose of TVPRA is "to bolster federal efforts to combat trafficking and, in the process, to provide critical protections for the tens of thousands of unaccompanied minors who come to the United States each year." JUNCK ET AL., *supra* note 4, at 1-14. "The law seeks to create better screening of unaccompanied minors who may be the victims of trafficking and other vulnerable children, safer repatriation of any youth removed from the United States, more compassionate environments for children in immigration custody, and broader legal protections and access to services for these youth." *Id.*

<sup>59</sup> See JUNCK ET AL., *supra* note 4, at 1-14 (describing the screening process that undocumented children endure to determine if they are a victim of human trafficking or fear persecution). If the child becomes older than twenty-one during the adjudication proceedings, the child is still eligible for SIJS approval. *Id.* at 3-8. "The TVPRA also provides that children be placed in the least restrictive setting that is in 'the best interest of the child' and prohibits children from being placed in secure facilities[.]" *Id.* at 1-14. An exception to the detention provision is "unless a determination has been made that the child poses a danger to him or herself or others or has been charged with having committed a criminal offense." *Id.* The TVPRA 2008 further provides that Health and Human Services "review such placement on a monthly basis." *Id.*

<sup>60</sup> Ooi, *supra* note 33, at 890; see also Deborah Lee et al., Practice Advisory, *Update on Legal Relief Options for Unaccompanied Alien Children Following the Enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*, at 5, [http://www.ilrc.org/files/235\\_tvptra\\_practice\\_advisory.infonet.pdf](http://www.ilrc.org/files/235_tvptra_practice_advisory.infonet.pdf) [<http://perma.cc/S57H-VTJ3>] (specifying that TVPRA transferred specific consent of children in Immigration and Customs Enforcement authority to the U.S. Department of Health and Human Services).

<sup>61</sup> See Lee et al., *supra* note 60, at 5 (reciting that TVPRA transferred the authority of specific consent, but did not explain how the U.S. Department of Health and Human Services should act upon that consent).

<sup>62</sup> *Id.* at 6. The progress with "aging-out" is due to the "Child Status Protection Act," which protects applicants from losing immigration benefits because they have reached the age of twenty-one. Pub. L. No. 107-208, 116 Stat. 927 (2002).

<sup>63</sup> See Ooi, *supra* note 33, at 890-91 (explaining the impact of the TVPRA 2008 SIJS amendment). Legal scholars have long advocated for legal representation for unaccompanied children facing the juvenile and immigration courts. David B. Thronson,

Currently, a SIJS petition has seven requirements: (1) dependency, delinquency, or other juvenile court proceedings;<sup>64</sup> (2) the juvenile court must find that reunification with one or both parents is not viable;<sup>65</sup> (3) due to abuse, neglect, abandonment or similar basis under State Law;<sup>66</sup> (4) the court or an administrative agency must determine that it is not in the child's best interest to be returned to his or her home country;<sup>67</sup> (5) the juvenile court judge should sign an order making the above finding;<sup>68</sup> (6) consent to the grant of SIJS and specific consent;<sup>69</sup> and (7) age and

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*Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 980 (2002) (addressing the rights of children in the immigration process while suggesting a child-centered approach). David Thronson advocated for a child-centered approach, as well as removing the INS power to determine immigration applicant's fate. *Id.* at 1012-13. This position is supported by "the conflict in having a single agency that adjudicates claims for immigration benefits while protecting the borders and prosecuting violations of immigration laws." *Id.* at 1013.

<sup>64</sup> JUNCK ET AL., *supra* note 4, at 3-4. This includes the courts placement of the child to an agency, department, individual, or entity appointed by a state or juvenile court. *Id.*

<sup>65</sup> See Lee et al., *supra* note 60, at 3-4 (discussing TVPRA 2008's change to the language of the SIJS, which is the most controversial provision of the statute). The language of the second requirement replaced the old requirement that the child must be "'deemed eligible for long-term foster care' by the court, which in turn was interpreted to mean that family reunification was no longer a viable option." JUNCK ET AL., *supra* note 4, at 3-5. Currently, the child does not have to prove he or she will never be able to reunite with the parent, but "as long as there is a significant separation" the court should find this requirement met. *Id.* at 3-4. Though some states argue that the "one or both" language is ambiguous, the current statute does not require a child to be separated from both parents to meet this requirement. *Id.* Instead "the statute appears to provide SIJS eligibility on the basis of the non-viability of reunification with one parent due to abuse, neglect, or abandonment, even while the child remains in the care of the other parent or while the court is actively trying to reunite the child with the other parent." *Id.* This portion of the requirements demonstrate the conflict with having a statute that requires state and federal intervention. *Id.*

<sup>66</sup> JUNCK ET AL., *supra* note 4, at 3-6. There does not have to be formal charges of abuse, neglect, or abandonment against the parents and the abuse does not have to occur within the United States. *Id.* See Chen, *supra* note 9, at 604 (expressing congressional intent in protecting vulnerable immigrant children). "In many SIJ cases, adults bring children into the country and continue to control and abuse them. Often parents have complete control over their child's immigration status . . . and may threaten the minor with deportation to prevent the minor from resisting and reporting the abuse." *Id.* See also Randi Mandelbaum & Elissa Steglich, *Disparate Outcomes: The Quest for Uniform Treatment of Immigrant Children*, 50 FAM. CT. REV. 606, 606 (2012) (explaining how immigrant children frequently interact with the family court system, especially in SIJS determinations).

<sup>67</sup> JUNCK ET AL., *supra* note 4, at 3-6. The judge should include language "that it is not in the child's best interest to be returned to his or her country of nationality" in the SIJS order, which can be evidenced by an interview with the child seeking SIJS. *Id.* at 3-6-3-7.

<sup>68</sup> See *id.* at 3-7 (reflecting the language of the revised SIJS statute, "the SIJS order will likely be rejected and a revised one will have to be obtained").

<sup>69</sup> See 8 U.S.C. § 1101(a)(27)(iii) (2012) (stating the actual consent requirement implemented by Congress, which is construed to deny eligible SIJS applicants); Yates, *supra* note 55, at 2 (declaring that "express consent is an acknowledgement that the request for SIJ classification is *bona fide*"); JUNCK ET AL., *supra* note 4, at 3-7 (expounding that the sixth

marriage requirements.<sup>70</sup> The only applicants eligible for SIJS are children who meet the family court requirements and receive the consent of the Department of Homeland Security ("DHS").<sup>71</sup>

Since the enactment of TVPRA 2008, there have been unsuccessful attempts to amend the current SIJS law.<sup>72</sup> In 2011, Congress proposed to extend dependency, commitment, or custody through the time of adjudication, to address the issue of applicants aging out of juvenile court dependence.<sup>73</sup> The 2011 proposals expressed support for the current age, marriage, and juvenile court special findings determinations; however, they gave little to no guidance on clarifying the viability of reunification with one or both parents due to abuse, neglect, or abandonment.<sup>74</sup>

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requirement is a two-part threshold: "(1) consent to the grant of SIJS in any case [by the Secretary of the Department of Homeland Security (DHS)]; and (2) specific consent for a juvenile court determination on a child's custody or placement status if the child is in federal custody during removal (deportation) proceedings". The Secretary of DHS gives consent by approving SIJS applications; "[t]his consent is an acknowledgement that SIJS was not 'sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect or abandonment.'" JUNCK ET AL., *supra* note 4, at 3-7 (quoting H.R. REP. NO. 105-405, at 130 (1997)). The second threshold only applies to the children who seek a juvenile court determination while in juvenile custody. *Id.* In sum, the second portion of consent is only relevant in the sense of that TVPRA 2008 amendment that the Department of Homeland Security was required to give specific consent to the SIJS petition. *Id.*

<sup>70</sup> JUNCK ET AL., *supra* note 4, at 3-8. The applicant must be under age twenty-one at time of filing with CIS, and must remain unmarried until the entire immigration process is completed. *Id.* Before the TVPRA 2008 amendments, this required applicants to complete the entire immigration adjudication process before turning twenty-one, but the amendment allows a person to be eligible as long as they are twenty-one or under when filing the SIJS petition with the USCIS. *Id.* Though the USCIS permits the child to be twenty-one when filing, "[s]tate laws generally require that a child be under age eighteen at the time he or she first is declared a juvenile court dependent." *Id.* Another issue for a child in the SIJS process is that dependency, delinquency, or other juvenile court jurisdiction ends when a child turns eighteen years of age, but one of the requirements for SIJS is that the petitioner have an active case with the juvenile court. *Id.* Since TVPRA provides "age-out" protection, the USCIS should not be able to deny anyone on the account of age. *Id.* at 3-9.

<sup>71</sup> See 8 U.S.C. § 1101(a)(27)(J) (enumerating the statutory requirements for SIJS applicants).

<sup>72</sup> See Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54978 (proposed Sept. 6, 2011) (addressing the unadopted 2011 SIJS amendments); Sarah Bronstein, *USCIS Issues Proposed Regulations Pertaining to Special Immigrant Juvenile Status*, CLINIC LEGAL, <https://cliniclegal.org/september2011newsletter/SIJS> [<https://perma.cc/GCW6-LURM>] (explaining the potential impact of these amendments).

<sup>73</sup> See Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54978 (proposed Sept. 6, 2011) (implementing changes to the SIJS portion of the INA).

<sup>74</sup> See Bronstein, *supra* note 72 (explaining the impact that the 2011 proposals could have on the SIJS process if adopted). The suggested 2011 amendment proposed the following: (1) to no longer provide for automatic revocation of the application for a petitioner who turns twenty-one; (2) clarified that adoption and guardianship proceedings fall under the meaning of the statute where a state could make a "special findings" determination; (3) juvenile courts

In November 2014, President Obama advocated for additional funding to support legalizing citizenship for millions of undocumented adults and children currently living in America.<sup>75</sup> In response, U.S. House Representatives have proposed acts that would prevent congressional funding of President Obama's immigration plan.<sup>76</sup> First, Representative Martha Roby released a Prevention of Executive Amnesty Act of 2015 that advocated against funding President Obama's immigration plan.<sup>77</sup> Then, Representative Robert Aderholt of Alabama filed the "Repeal Executive Amnesty Act of 2015," which contains a provision to strike "[one] or both of the immigrant's parents" language of the current SIJS statute and replace it with "either of the immigrant's parents."<sup>78</sup> The U.S. House of

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maintain jurisdiction throughout the entire SIJS process; (4) the abuse, neglect, and abandonment analysis rests solely on the state court; (5) consent of a juvenile court order is not required; (6) clarified that the 180-day period to adjudicate I-360 petitions begin when a receipt notice from the USCIS is issued; and (7) some inadmissibility and adjustment of status changes. *Id.* The 2011 proposal failed to make any further comment on the TVPRA 2008 change from the "long-term foster care" to "one or both" parent language, which continues to divide the state courts. *Id.*

<sup>75</sup> See Alicia Parlapiano, *What Is President Obama's Immigration Plan?*, N.Y. TIMES (Nov. 21, 2014), [http://www.nytimes.com/interactive/2014/11/20/us/2014-11-20-immigration.html?\\_r=0](http://www.nytimes.com/interactive/2014/11/20/us/2014-11-20-immigration.html?_r=0) [<http://perma.cc/5S66-T4WN>] (describing President Obama's current immigration plan that will allow undocumented immigrants that were present in the United States for five years or more to potentially receive lawful permanent residency).

<sup>76</sup> See Warren Mass, *House Passes "Executive Amnesty Prevention Act of 2014"*, U.S. NEWS (Dec. 5, 2014), <http://www.thenewamerican.com/usnews/immigration/item/19667-house-passes-executive-amnesty-prevention-act-of-2014> [<http://perma.cc/QM92-CEVV>] (recounting that the House passed the Amnesty Prevention Act to prevent President Obama's immigration plan from moving forward); Byron York, *The Two GOP Plans to Stop Obama's Immigration Action*, WASH. EXAM'R (Jan. 8, 2015), <http://www.washingtonexaminer.com/the-two-gop-plans-to-stop-obamas-immigration-action/article/2558347> [<http://perma.cc/3ZHB-ZLZU>] (discussing the Alabama Senators' proposals for immigration reform).

<sup>77</sup> Press Release, Martha Roby, *Roby Bill Seeks to Block Executive Amnesty* (Jan. 7, 2015), <http://roby.house.gov/press-release/roby-bill-seeks-block-executive-amnesty> [<http://perma.cc/9TMK-GQMF>] [hereinafter Press Release, Roby] (arguing that President Obama's plan was irresponsible).

<sup>78</sup> S. 114th Cong. § 302 (proposed Jan. 8, 2015). The proposed statute reads as follows: "Section 101(a)(27)(I)(i) of the Immigration and Nationality Act (8 U.S.C. 1011(a)(27)(I)(i)) is amended by striking '[one] or both of the immigrant's parents' and inserting 'either of the immigrant's parents.'" *Id.* Additionally, Rep. Aderholt proposes to change the definition of unaccompanied alien. *Id.* § 304. The proposal suggests the following definition:

Section 462(g)(2) of the Homeland Security Act of 2002 (6 U.S.C.

279(g)(2)) is amended to read as follows:

(2) The term "unaccompanied alien child" —

(A) means an alien who —

- (i) has no lawful immigration status in the United States;
- (ii) has not attained 18 years of age; and
- (iii) with respect to whom —



Representatives voted in favor of defunding President Obama's immigration plans; however, advocates are still fighting for undocumented children's rights.<sup>79</sup> If these proposals are adopted, many valid SIJS petitions will be denied.<sup>80</sup>

*D. SIJS Divided: The Role of the State and Federal Government in SIJS Determinations*

Currently in state judicial proceedings, courts disagree on TVPRA 2008's impact on SIJS.<sup>81</sup> The courts disagree specifically on the role of the state and federal government in determining SIJS eligibility, and the intent of Congress in removing "long-term foster care" and replacing it with

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- (I) there is no parent or legal guardian in the United States;
  - (II) no parent or legal guardian in the United States is available to provide care and physical custody; or
  - (III) no sibling over 18 years of age, aunt, uncle, grandparent, or cousin over 18 years of age is available to provide care and physical custody; except that

(B) such term shall cease to include an alien if at any time a parent, legal guardian, sibling over 18 years of age, aunt, uncle, grandparent, or cousin over 18 years of age of the alien is found in the United States and is available to provide care and physical custody (and the Secretary of Homeland Security and the Secretary of Health and Human Services shall revoke accordingly any prior designation of the alien under this paragraph).

*Id.* If this statute was adopted, children who may not have any contact with family members in the United States could be excluded from the definition of an unaccompanied alien. *Id.*

<sup>79</sup> See Rebecca Shabad & Cristina Marcos, *House Passes Bill to Defund Obama's Immigration Orders*, THE HILL (Jan. 14, 2015, 12:06 PM), <http://thehill.com/blogs/floor-action/house/229469-house-votes-to-defund-obamas-immigration-orders> [<http://perma.cc/ZQU2-F38R>] (asserting that the House passed a bill to defund Obama's immigration plan); Memorandum from Fordham Law School for the U.S. House of Representatives Judiciary Committee (Mar. 2, 2015) (on file with the author) (urging Congress not to adopt H.R. 1153 because it is contrary to the child's best interests); Fordham Univ. School of Law et al., *Special Provisions for Immigrant Youth: A Model State Statute 4* (Feb. 2015), [http://law.fordham.edu/assets/FeerickCenter/UIC\\_Report\\_--\\_February\\_2015.docx\\_\(PDF\\_Final\\_Report\)\\_uploaded\\_2-18-2015\(1\).pdf](http://law.fordham.edu/assets/FeerickCenter/UIC_Report_--_February_2015.docx_(PDF_Final_Report)_uploaded_2-18-2015(1).pdf) [<http://perma.cc/TAE5-S9H6>] (proposing a Model State Statute to assist states in determining the best interests of undocumented children).

<sup>80</sup> See *infra* Part III.C (discussing the impact of denying children SIJS on account of having one parent present in the United States).

<sup>81</sup> See *infra* Part III.C (analyzing the differing interpretations of state courts and the USCIS of TVPRA 2008). Compare *In re J.C.*, CO68667, 2015 WL 513399, at \*17 (Cal. Ct. App. Feb. 6, 2015) (denying a seventeen year old's request for special findings because the child's mother was present and not because of the child's juvenile delinquency), with *In re Karen C.*, 111 A.D.3d 622, 623 (N.Y. App. Div. 2013) (affirming a Family Court's decision granting "special findings" for SIJS based on detailed affidavits from the child and the child's mother describing the father's abandonment).

“reunification with [one] or both parents.”<sup>82</sup> Part II.D.1 observes the federal government’s role in the SIJS process.<sup>83</sup> Part II.D.2 explains the state’s role in the SIJS process and the differing interpretations of who qualifies for SIJS, paying special attention to New York’s and Nebraska’s Supreme Court decisions.<sup>84</sup>

# 1. Federal Government: Apprehension, Detainment, and Consent

The federal government’s involvement in SIJS starts at the border if the child is captured by border patrol.<sup>85</sup> Once captured by an agency, the child will be held in the custody of that specific agency, which could be DHS, USCIS, Department of Health and Human Services, or the Office of Refugee Resettlement.<sup>86</sup> If the child has a family member whom they could be released into the custody of, the agency will release the child.<sup>87</sup> If the child does not have a family member to take custody, the child can

<sup>82</sup> See Laura E. Ploeg, *Special Immigrant Juveniles: All the Special Rules*, 8 IMMIGR. L. ADVISOR 1, 4 (2014), <http://www.justice.gov/eoir/vll/ILA-Newsletter/ILA%202014/vol8no1.pdf> [<http://perma.cc/45YX-GC2Z>] (“Prior to the TVPRA amendments, SIJ classification required a State court finding that the child was eligible for long-term foster care, which effectively meant that reunification was not viable with either parent.”); *supra* Part II.B-C (weighing the amendments to SIJS statutory language). The U.S. Department of Justice states that “the alien child could potentially be living with one parent and still qualify for SIJ status.” Ploeg, *supra* note 82, at 4.

<sup>83</sup> See *infra* Part II.D.1 (examining the federal government’s role in SIJS for children in federal custody at the time of judicial proceedings and consent upon juvenile court orders).

<sup>84</sup> See *infra* Part II.D.2 (introducing the differing opinions of the New York Supreme Court and the Nebraska Supreme Court regarding the statutory interpretation of SIJS).

<sup>85</sup> See Timothy E. Yahner, *Splitting the Baby: Immigration, Family Law, and the Problem of the Single Deportable Parent*, 45 AKRON L. REV. 769, 782 (2012) (explaining that an alien in custody of Border Patrol may apply for relief from deportation, but the alien must prove eligibility for one of the forms of relief).

<sup>86</sup> See Anderson, *supra* note 11, at 675 (revealing the agencies involved in capturing and placing undocumented children). “Because USCIS is charged with the primary responsibility of deporting illegal immigrants, some have questioned whether USCIS is the best organization to make final determinations on SIJ status, as granting a petition contradicts its primary purpose.” *Id.* at 675–76. See also Catherine E. Halliday, *Inheriting the Storied Pomp of Ancient Lands: An Analysis of the Application of Federal Immigration Law on the United States’ Northern and Southern Borders*, 36 VAL. U. L. REV. 181, 207 (2001) (discussing the United States’ selective border patrol policies, which demonstrates a specific prejudice to the Mexican border). “The Mexican border receives one border patrol agent for every half of a mile, whereas the Canadian border receives one border patrol agent for every thirteen miles.” *Id.*

<sup>87</sup> See Olga Byrne & Elise Miller, *The Flow of Unaccompanied Children Through the Immigration System: A Resource for Practitioners, Policy Makers, and Researchers*, VERA INST. OF JUST. 10 (2012) (explaining that a child can be apprehended by the Customs and Border Patrol, U.S. Coast Guard, Department of Homeland Security, or Immigration and Customs Enforcement). “Other unaccompanied children are first arrested by a state or local law enforcement agency, and when these ‘internal apprehensions’ occur, an immigration arrest may take place at various points during the juvenile or criminal justice process.” *Id.*

## 202 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 50]

petition a juvenile court for special findings required for SIJS while in the custody of the agency.<sup>88</sup>

Once an applicant receives the required special findings from the juvenile court, the applicant may petition the USCIS for SIJS.<sup>89</sup> The child must complete the SIJS petition (Form I-360) and an Application to Register Permanent Residence or Adjust Status (Form I-485).<sup>90</sup> Then, the child is either granted SIJS or denied through the “consent” of the Secretary of DHS.<sup>91</sup>

Children seeking SIJS approval remain vulnerable to the possibility of having their petition denied by the Field Office Director despite meeting statutory requirements.<sup>92</sup> Currently, the federal statute regulating SIJS provides states with unilateral discretion to determine eligibility.<sup>93</sup>

<sup>88</sup> See 8 U.S.C. § 1101(a)(27)(J) (2012) (stating that a child in the custody of USCIS can petition a juvenile court for SIJS).

<sup>89</sup> See Heryka Knoespe, *Special Immigrant Juvenile Status: A “Juvenile” Here Is not a “Juvenile”* There, 19 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 505, 515 (2013) (describing the complex dual relationship between the state and federal government for SIJS).

<sup>90</sup> See DEP’T OF HOMELAND SECURITY, SIJ PETITION PROCESS (2011), <http://www.uscis.gov/green-card/special-immigrant-juveniles/sij-petition-process> [<http://perma.cc/T788-4BHM>] (requiring applicants to file a Form I-360 Petition for Amerasian, Widow(er), or Special Immigrant and a Form I-485 Application to Register Permanent Residence or Adjust Status). The forms can be filed separately, but it is more efficient if the applicant files the forms together. *Id.*

<sup>91</sup> See U.S. Citizenship and Immigration Services, *Petition for Special Immigrant Juvenile Pursuant to Section to 203(b)(4) of the Immigration and Nationality Act*, 8 U.S.C. § 1153(b)(4), at 4 (June 4, 2009), [http://www.uscis.gov/sites/default/files/err/C6%20-%20Dependent%20of%20Juvenile%20Court/Decisions\\_Issued\\_in\\_2009/Jun042009\\_01C6101.pdf](http://www.uscis.gov/sites/default/files/err/C6%20-%20Dependent%20of%20Juvenile%20Court/Decisions_Issued_in_2009/Jun042009_01C6101.pdf) [<http://perma.cc/RTZ8-3J29>] (modifying the definition of the two forms of consent—express and specific consent). The Field Officer Director (“FOD”) denied an eighteen year old child from El Salvador’s request because he felt that the petitioner failed to show that the juvenile court order was sought primarily for the purpose of obtaining relief from abuse, neglect, or abandonment. *Id.* at 5. The FOD ruled the evidence suggested the child came to the United States to be reunited with her parents. *Id.* However, on April 17, 2009, just two months before the *El Salvador* decision, the Administrative Appeals Office (“AAO”) granted a child’s SIJS petition stating that “it is not a matter of discretion but of eligibility.” U.S. Citizenship and Immigration Services, *Petition for Special Immigrant Juvenile Pursuant to Section to 203(b)(4) of the Immigration and Nationality Act*, 8 U.S.C. § 1153(b)(4), at 4 (Apr. 17, 2009), [http://www.uscis.gov/sites/default/files/err/C6%20-%20Dependent%20of%20Juvenile%20Court/Decisions\\_Issued\\_in\\_2009/Apr172009\\_01C6101.pdf](http://www.uscis.gov/sites/default/files/err/C6%20-%20Dependent%20of%20Juvenile%20Court/Decisions_Issued_in_2009/Apr172009_01C6101.pdf) [<http://perma.cc/4A4Q-WAC6>] (quoting *Matter of Polidoro*, 12 I & N Dec. 353, 354 (BIA 1967)) (reviewing an eighteen year old citizen of Guatemala’s SIJS petition).

<sup>92</sup> See 8 U.S.C. § 1101(a)(27)(J)(iii) (2012) (pronouncing that the Secretary of the Department of Homeland Security must consent to the grant of SIJS to be valid).

<sup>93</sup> See Knoespe, *supra* note 89, at 515 (examining the federal government’s role in SIJS). The issue with the federal government’s discretion in granting SIJS is due to the conflict in roles. *Id.* One scholar states:

The INS’s primary mission and functions are to enforce immigration law, monitor United States borders and ports of entry, and remove individuals who do not have lawful immigration status. The role of the

Further, the USCIS denies many SIJS petitions for failure to state a *bona fide* petition.<sup>94</sup>

## 2. State Government: The Best Interests of the Child

The juvenile court is responsible for determining if “special findings” exist that enable the applicant to petition the USCIS for SIJS.<sup>95</sup> In determining special findings, the juvenile court ensures the following procedural hurdles are satisfied: the child is unmarried, under the age of twenty-one, and dependent on the juvenile court.<sup>96</sup> In addition, the juvenile court is required to make a substantive evaluation to determine if the child is unable to be reunited with “one or both parents due to abuse, abandonment, or neglect” and whether it is in the child’s best interest to return to his or her country of citizenship.<sup>97</sup> Different states come to different results, leaving inconsistencies for immigrant children seeking SIJS.<sup>98</sup> New York takes a plain meaning approach to the SIJS statute, whereas Nebraska takes a narrow, more restricting approach.<sup>99</sup> These two approaches result in outcome disparities for similarly situated children, dependent upon which state the child seeks a juvenile court order to petition the USCIS.<sup>100</sup>

The New York Supreme Court reversed a lower court decision that denied a young girl and her little brother “special findings” to petition the

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INS is that of a gatekeeper, not a disinterested party concerned with assessing the needs of children. These functions place the agency in an adversarial relationship with respect to all child applicants for SIJ status. The INS cannot serve as both an adversary and a neutral adjudicator of a child’s “best interest.”

Chen, *supra* note 9, at 612. The conflicting objectives of the INS do not serve the best interests of the child. *Id.*

<sup>94</sup> See Memorandum from Donald Neufeld, *supra* note 55, at 3 (discussing the USCIS’ discretion in granting consent if the applicant fails to prove that the claim is sought for relief from abuse, abandonment, or neglect, as opposed to trying to circumvent the immigration process and receive lawful permanent residency).

<sup>95</sup> See Knoespe, *supra* note 89, at 512 (concluding that a juvenile court must find facts based on state law to determine an applicant’s ability to petition the USCIS for SIJS).

<sup>96</sup> See 8 C.F.R. § 204.11(c) (2014) (declaring that in order for an applicant to be granted SIJS, the applicant must meet all of the Section 204.11(c) statutory requirements).

<sup>97</sup> See *supra* Part II.C (describing the current SIJS requirements).

<sup>98</sup> Compare *Marcelina M.-G. v. Israel S.*, 112 A.D.3d 100, 115 (N.Y. App. Div. 2013) (interpreting the SIJS statute broadly to grant petitioner SIJS), with *In re Erick M.*, 820 N.W.2d 639, 648 (Neb. 2012) (interpreting the SIJS statute narrowly to deny petitioner SIJS).

<sup>99</sup> See *infra* Part II.D.2 (explaining the position of Nebraska and New York on TVPRA 2008’s impact on SIJS).

<sup>100</sup> See *infra* Part III.C (analyzing the impact that the differing statutory interpretations have on similarly situated children).

## 204 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 50]

USCIS for SIJS.<sup>101</sup> Prior to being in the United States, the children's mother left them at a young age in Honduras to come and work in the United States.<sup>102</sup> Years later, the children made the same journey to be with their mother, because of the abuse they suffered from their caretaker.<sup>103</sup> After getting caught at the United States-Mexico border, they were placed in a Texas foster home and then allowed to stay in the United States with an uncle in New York.<sup>104</sup>

The family petitioned a New York Family Court for SIJS eligibility, but their applications were denied because reunification with one parent was viable, thus making them ineligible for SIJS.<sup>105</sup> The family appealed to the New York Supreme Court, who reversed and determined that the "[one] or both" language has a plain meaning understanding.<sup>106</sup> Additionally, the court found that the elimination of the "long-term foster care" requirement with the replacement of the "[one] or both" language demonstrated an intent by the legislature to remove the requirement that both parents had to be absent and allowed the children to receive SIJS if abandoned, abused, or neglected by at least one parent.<sup>107</sup>

A scenario with similar facts unfolded differently in Nebraska.<sup>108</sup> While in a juvenile treatment center, a teenage boy petitioned the family

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<sup>101</sup> See *Marcelina M.-G.*, 112 A.D.3d at 115 (ruling that the children met the SIJS statutory requirements because they are unmarried, under twenty-one years of age, reunification with one or both parent was not viable due to abuse, neglect, and abandonment); MERRIL SOBIE & GARY SOLOMON, 10 N. Y. FAM. CT. PRAC. § 2:113 (2d ed. 2014) (stating that the statute only requires a showing that reunification with one parent would not be feasible and it would not be in the best interest of the child to return to his or her home country).

<sup>102</sup> *Marcelina*, 112 A.D.3d at 102. Susy and Jason were left with their aunt Estella, who had children of her own, leaving them with little to no familial support. *Id.* The children were miserable living with their Aunt Estella, who physically and mentally abused Susy and Jason. *Id.*

<sup>103</sup> *Id.* at 103. The mother arranged for the children to receive financial support from her boyfriend, and then they set out on their long journey to the United States. *Id.*

<sup>104</sup> *Id.* The children were detained for approximately eighty days before being released into the custody of their uncle. *Marcelina M.-G.*, 112 A.D.3d at 103.

<sup>105</sup> *Id.* at 106. The Family Court granted the mother's petition to be the sole legal guardian for the children, and denied the special findings because the children did not need both parents. *Id.*

<sup>106</sup> *Id.* The court interpreted the statute to mean that when reunification with just one parent is not viable, the child is eligible for SIJS even if reunification with the other parent is viable. *Id.* at 111.

<sup>107</sup> *Id.* at 111-12; see Karen Moulding, *Eligibility for Special Immigrant Juvenile Status Under 8 U.S.C.A. § 1101(a)(27)(J) and 8 C.F.R. § 204.11*, 67 A.L.R. Fed. 2d 299 § 9 (2012) (weighing the outcome in immigration cases where the child was in custody of one parent and applied for special findings from a juvenile court for SIJS eligibility).

<sup>108</sup> See *In re Erick M.*, 820 N.W.2d 639, 642 (Neb. 2012) (explaining the circumstances that led to Erick's SIJS application in greater detail).

court for SIJS eligibility.<sup>109</sup> The boy automatically met the first requirement because he was dependent on a juvenile court; however, the family court found that he failed to show that reunification with his mother was not viable due to abuse, neglect, or abandonment.<sup>110</sup>

The young boy appealed to the Supreme Court arguing that INA Section 1101(a)(27)(J)(i) required that he show only that reunification with one parent is not feasible because of abuse, neglect, or abandonment.<sup>111</sup> The court found his argument reasonable; however, it favored the state's alternative interpretation that the phrase "[one] or both" means that juvenile courts have discretion in ruling that either reunification with one parent is not feasible or reunification with both parents is not feasible.<sup>112</sup> The Nebraska Supreme Court relied on the 1997 SIJS Amendment by stating that "Congress intended that the amendment would prevent youths from using this remedy for the purpose of obtaining legal permanent resident status, rather than for the purpose of obtaining relief from abuse or neglect."<sup>113</sup> While the court found that the boy's father did

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<sup>109</sup> *Id.* at 641. In December 2010, a juvenile court committed Erick to the Office of Juvenile Services for possession of alcohol. *Id.* at 642. In July 2011, Erick was transferred to a Youth Rehabilitation and Treatment Center, where he continually disappeared, used alcohol and drugs, violated the law, and threatened staff. *Id.* Erick explained to the staff that his erratic behavior was because he wanted to go home for rehabilitation. *Id.* In September 2011, the juvenile court began a hearing for Erick's SIJS motion for eligibility. *Id.*

<sup>110</sup> *Erick M.*, 820 N.W.2d at 642. To support a court finding of abandonment, Erick's family permanency specialist presented evidence that he did not have any contact information for his father. *Id.* Erick's family permanency specialist further testified that she was unsure if paternity had been established, and that his father could be in either Mexico or New York. *Id.* She also stated that she would continue to work with Erick's mother regarding his behavior upon his release from the rehabilitation center. *Id.* at 642-43.

<sup>111</sup> *Id.* at 643. Particularly, Erick focused on the "[one] or both" language in the statute arguing that Congress intended the statute to allow SIJS if the court found abuse, abandonment, or neglect by one parent. *Id.* See also CHRISTINE P. COSTANTAKOS, 4 NEB. JUV. CT. LAW & PRAC. § 12:14 (2014) (interpreting the *Erick M.* decision to hold that because the juvenile could not prove that reunification was not viable with both parents, he did not meet the reunification requirement of the SIJS statute).

<sup>112</sup> See Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54980 (proposed Sept. 6, 2011) (suggesting possible amendments to the SIJS statute). The Nebraska Supreme Court began its analysis by stating that where there is ambiguity in a statute, courts are allowed to examine the act's legislative history. *Erick M.*, 820 N.W.2d at 644. Further, the court acknowledged that the 2011 proposals were not adopted and that the proposals did not address the ambiguity in the language of the statute. *Id.* The court agreed that TVPRA 2008 expanded the pool of undocumented children who could apply for SIJS, but states that the juvenile "must still be seeking relief from parental abuse, neglect, or abandonment." *Id.* at 645.

<sup>113</sup> *Erick M.*, 820 N.W.2d at 645. "USCIS will not consent to a petition for SIJ status if it was 'sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect or abandonment.'" *Id.* at 646.

## 206 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 50]

abandon him, the court held that he must also show that reunification with the other parent is not feasible.<sup>114</sup> Ultimately, the court held that the boy's petition was not *bona fide*.<sup>115</sup> The Nebraska Supreme Court stated that this boy was not abandoned because his father was never present in his life and his mother was still in his life; yet three years prior, in *David C.*, the same court decided that a boy whose father left during the mother's pregnancy had abandoned him.<sup>116</sup> As a result of two different interpretations by New York and Nebraska, two very similar set of facts

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<sup>114</sup> *Id.* at 647. However, the court took a narrow approach to interpreting the statute. *Id.* The court used its discretion to focus on the feasibility of reunification with only one parent. *Id.* Further, the court determined there was no need to consider whether reunification with the father was feasible because Erick could return to a safe parent, his mother. *Id.* The court presented a new rule that states "[i]f a juvenile alien's absent parent has abused, neglected, or abandoned the juvenile, a petitioner seeking SIJ status for the juvenile should offer evidence on this issue." *Erick M.*, 820 N.W.2d at 648. The court determined that Erick's case presented an exception to the rule because he lived with his mother during the juvenile court proceedings. *Id.* The court found that the effects of abandonment from an absent parent were irrelevant for SIJS. *Id.* at 647. The court also determined that there was no need to analyze Erick's father's abandonment since reunification with Erick's mother was feasible. *Id.* at 648. The Nebraska Supreme Court minimized the emotional turmoil that Erick suffered from his father's abandonment because Erick did not claim that reunification with his mother was not feasible. *Id.* at 647.

<sup>115</sup> *Id.* at 648.

<sup>116</sup> *Erick M.*, 820 N.W.2d at 642. See *Adoption of David C.*, 790 N.W.2d 205, 211 (Neb. 2010) (affirming the trial court's finding of abandonment by the child's father). The child, David, resided with his mother since birth. *Id.* at 208. A few years later, David's mother married a man, who is not David's biological father, and petitioned the court for a step-parent adoption. *Id.* at 207. David's mother alleged that David's father abandoned him. *Id.* at 208. The Nebraska Supreme Court agreed and ruled in favor of the petitioner. *Id.* at 212. This case was not about SIJS or immigration, but another case in which the court was asked to determine the best interests of the child. *Id.* The court defined willful abandonment as:

[A] voluntary and intentional relinquishment of the custody of the child to another, with the intent to *never again* claim the rights of a parent or perform the duty of a parent; or, second, an intentional withholding from the child, without just cause or excuse, by the parent, of his presence, his care, his love and his protection, maintenance, and the opportunity for the display of filial affection[.]

*David C.*, 790 N.W.2d at 211. The Nebraska Supreme Court affirmed the trial court by finding that the "record supports by clear and convincing evidence that [the father] abandoned [the child]," because the father had no contact with the son, did not offer any parental or financial support, and did not attempt to visit the child. *Id.* Additionally, the court found the child to be abandoned by his father because the father "voluntarily discontinu[ed] any contact with [the child]." *Id.* at 211. Under the same analysis that the court used in *David C.*, Erick's father willfully abandoned him. *Id.* at 211; *Erick M.*, 820 N.W.2d at 643. Erick's father intentionally withheld "his presence, his care, his love and his protection, maintenance, and the opportunity for the display of filial affection[.]" *David C.*, 790 N.W.2d at 211; *Erick M.*, 820 N.W.2d at 643. Erick's father did not attempt to make any contact with him, nor did he provide for Erick financially, emotionally, or any other actions attributed to fathers. *Erick M.*, 820 N.W.2d at 647.

can have two very different outcomes.<sup>117</sup> Therefore, because of the outcome disparities, a solution is needed to find one uniform and feasible option for the courts to apply.<sup>118</sup>

### III. ANALYSIS

The varying and narrow interpretations of current SIJS law must be addressed given the realities of the increasing number of undocumented children in the United States.<sup>119</sup> Despite TVPRA 2008's amendment to the SIJS statute, courts continue to embrace the limiting and restricting standard derived from the 1997 Congressional Report.<sup>120</sup> Although TVPRA 2008 deliberately removed the requirement that the applicant be eligible for long-term foster care, courts have been slow to fully accept the added "[one] or both" language.<sup>121</sup>

Consequently, courts apply varying standards to SIJS statutory interpretation; and thus, the law has failed to promote uniformity in SIJS juvenile proceeding outcomes.<sup>122</sup> The issues prior to TVPRA 2008 are ongoing, despite congressional indication to depart from the prior standard, which is evidenced by replacing the existing long term foster care language with "[one] or both."<sup>123</sup> Primarily, inconsistent applications

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<sup>117</sup> See *Marcelina M.-G. v. Israel S.*, 112 A.D.3d 100, 115 (N.Y. App. Div. 2013) (explaining the SIJS statutory interpretation of New York's court); *Erick M.*, 820 N.W.2d at 648 (discussing Nebraska's narrow interpretation of SIJS).

<sup>118</sup> See *infra* Part IV.A (proposing to amend the current SIJS statute).

<sup>119</sup> See *supra* note 5 and accompanying text (recognizing the increasing number of undocumented children in the United States).

<sup>120</sup> See *supra* note 113 and accompanying text (noting the Nebraska Supreme Court's reliance on a 1997 Congressional Report).

<sup>121</sup> See, e.g., *In re J.E.*, 74 A.3d 1013, 1023 (N.J. Super. Ct. Ch. Div. 2013) (granting two brothers SIJS special findings even though they could be safely placed within the custody of their mother). The court reasoned that the children could be in danger if returned to their native country and out of the custody of their only safe parent. *Id.* at 1022. However, the decision was overruled a year later. *H.S.P. v. J.K.*, 87 A.3d 255, 269 (N.J. Super. Ct. App. Div. 2014). In a similar case, the court reasoned that the child's mother had not abused, neglected, or abandoned him, and therefore the petitioner failed to show that reunification with his mother was not viable. *Id.* The court relied on *Erick M.* as persuasive authority to deny special findings needed from the juvenile court. *Id.* The court stated that "the express objective of the petition was for M.S. to obtain relief for purposes of his immigration status, rather than for the purpose of obtaining relief from abuse, neglect, or abandonment[.]" *Id.*

<sup>122</sup> See *supra* Part II.D.2 (comparing the New York and Nebraska Supreme Court decisions regarding the child's eligibility for SIJS when one fit parent is involved in the child's life).

<sup>123</sup> Compare Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, § 113, 111 Stat. 2440 (1997) (requiring the SIJS applicant to be eligible "for long-term foster care due to abuse, neglect, or abandonment"), with William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044 (removing the long-term foster care requirement in the SIJS statute); see also *supra* Part II.B-C (discussing the implication of the long-term



208 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 50]

of the SIJS statute result in outcome disparities between similarly situated children in SIJS eligibility decisions.<sup>124</sup> Further, state courts fail to consider the harm that families experience when a child is denied “special findings” to petition the USCIS for SIJS.<sup>125</sup>

First, Part III.A analyzes congressional intent with TVPRA 2008’s deliberate change in language to the 1997 SIJS Amendment.<sup>126</sup> Next, Part III.B evaluates the inadequacy of current SIJS proposals.<sup>127</sup> Finally, Part III.C examines the narrow interpretations of SIJS post-TVPRA 2008, and argues that the federal and state government should follow the New York interpretation of SIJS.<sup>128</sup>

A. *Judicial Reliance: The 1997 Congressional Report under TVPRA 2008’s “[one] or both” Standard*

Though TVPRA 2008 is primary authority, courts such as Nebraska’s Supreme Court, continue to rely on the 1997 Congressional Report for its narrow interpretation.<sup>129</sup> Despite reliance on the 1997 Congressional Report to deny eligible SIJS applicants, the 1997 SIJS Amendment was not all bad.<sup>130</sup> One of the benefits of the 1997 SIJS Amendment was that it correctly included the requirement that the child be the victim of abuse,

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foster care requirement and the modification of the language to “viability of reunification with [one] or both parents” in TVPRA 2008).

<sup>124</sup> See *supra* notes 24, 28, 101, 108 (comparing the differing interpretations of the California, Maryland, New York and Nebraska courts on SIJS eligibility and the states’ role in the SIJS process); see, e.g., *In re Welfare of D.A.M.*, No. A12-0427, 2012 WL 6097225, at \*3 (Minn. Ct. App. Dec. 10, 2012) (holding that children in the custody of one parent are eligible for SIJS).

<sup>125</sup> See *JUNCK ET AL.*, *supra* note 4, at 3-11 (recognizing that once undocumented children petition the court for SIJS, they alert authorities that they are undocumented in the United States); *Yahner*, *supra* note 85, at 781 (stating that children are allowed to petition the United States for relief from deportation).

<sup>126</sup> See *infra* Part III.A (advocating for TVPRA 2008’s expansion of the pool of children eligible to receive SIJS).

<sup>127</sup> See *infra* Part III.B (evaluating the inadequacy of current SIJS proposals).

<sup>128</sup> See *infra* Part III.C (analyzing the impact of the New York and Nebraska court interpretations of SIJS).

<sup>129</sup> See H.R. REP. NO. 105-405, at 130 (1997) (pointing out the concern that children would seek the benefit for immigration purposes). This SIJS congressional report receives considerable deference, however, a conference report from the House of Representatives or an interoffice memorandum is merely a type of secondary, non-binding authority. AMY E. SLOAN, *BASIC LEGAL RESEARCH: TOOLS AND STRATEGIES* 5 (5th Ed. 2012). “Secondary authority . . . is always persuasive . . . once you identify an authority as secondary, you can be certain that it will not control the outcome of the issue[.] An authority is either part of ‘the law,’ or it is not.” *Id.* Therefore, the 1997 Congressional Report is neither a part of the law, nor does it have the authority to control the outcome of SIJS determinations. *Id.*

<sup>130</sup> See *supra* Part II.B (discussing the 1997 SIJS Amendment and the requirements placed on SIJS applicants).

abandonment, or neglect.<sup>131</sup> Before the 1997 SIJS Amendment, some children could abuse the remedy because the intent was implied, but not expressed.<sup>132</sup> In expressly stating the three categories of children eligible for the SIJS remedy, the statute eliminated any confusion as to the intended beneficiaries.<sup>133</sup>

However, the 1997 SIJS Amendment unnecessarily placed some lengthy and burdensome tasks on children who needed immediate relief.<sup>134</sup> The added long-term foster care requirement forced children who have been abused, abandoned, or neglected to go into the foster care system.<sup>135</sup> Additionally, the 1997 SIJS Amendment created the issue of “aging-out” of the system before the children were able to receive SIJS.<sup>136</sup> The 1997 SIJS Amendment contradicted the purpose of providing adequate relief for the abused, neglected, and abandoned children, because it created obstacles, confusion, and further trauma to victimized children.<sup>137</sup>

Furthermore, the continued reliance on the 1997 Congressional Report by judicial and administrative naysayers is the largest problem with the

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<sup>131</sup> Compare Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978 (requiring that SIJS applicants be deemed eligible for long-term foster care), with Dep’t of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriates Act, Pub. L. No. 105-119, § 113, 111 Stat. 2440 (1997) (requiring that SIJS applicants be deemed for long-term foster care due to abuse, neglect, or abandonment). The 1997 SIJS Amendment attempted to address the problem with children not in USCIS custody who were abusing the SIJS remedy. *Id.*

<sup>132</sup> See 1997 CONGRESSIONAL REPORT, *supra* note 52, at 130 (comparing the language of SIJS 1990 and 1997 SIJS Amendment as a means of achieving the goal to protect children who may be endangered once returning to their native country).

<sup>133</sup> See Lloyd, *supra* note 10, at 239 (describing Arizona Senator Domenici’s concerns of abuse from non-detained juveniles, and congressional response in the 1997 SIJS Amendment).

<sup>134</sup> See Anderson, *supra* note 11, at 671 (reporting that the 1997 SIJS Amendment required some children to stay in the foster system for up to eighteen months); see also Maria Virginia Martorell, *Special Immigrant Juvenile Status: Problems with Substantive Immigration Law and Guidelines for Improvement*, SSRN at 17 (Jan. 18, 2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1832043](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1832043) [<http://perma.cc/E7CD-P77W>] (observing that under the 1997 SIJS Amendment, children needed a final order issued for long-term foster care which could take eighteen months for the SIJS process to begin).

<sup>135</sup> See Lloyd, *supra* note 10, at 244 (stating that “the INS will seek revocation of any juvenile court dependency order issued for a detained alien juvenile as such juveniles are not eligible for long-term foster care because of their federal detention”).

<sup>136</sup> See *supra* note 62 and accompanying text (addressing the “aging out” issue created by 1997 SIJS Amendment).

<sup>137</sup> See Lloyd, *supra* note 10, at 246 (quoting Special Immigrant Status, 58 Fed. Reg. 42843, 42847 (1993)) (confirming that Congress contradicted its own 1993 statement that “it would be both impractical and inappropriate for the Service to routinely readjudicate judicial or social service agency administrative determinations”).

210 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 50]

1997 SIJS Amendments.<sup>138</sup> The 1997 SIJS Amendments do not state that SIJS petitions may be denied on the basis of failure to state a claim that is not *bona fide*, yet many SIJS petitions are denied for this reason.<sup>139</sup> The 1997 Congressional Report is not controlling, but persuasive at best.<sup>140</sup> Therefore, the USCIS and state governments that want to narrowly construe the statute are placing too much deference on the 1997 Congressional Report.<sup>141</sup>

Federal and state governments that narrowly construe the current SIJS statute argue that the statute is ambiguous, and therefore can rely on

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<sup>138</sup> See H.R. REP. NO. 105-405, at 130 (considering the birth of the *bona fide* petition requirement). The 1997 Congressional Report states that the language was modified to ensure that “neither the dependency order nor the administrative or judicial determination of the alien’s best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect.” *Id.*

<sup>139</sup> See Dep’ts of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, § 113, 111 Stat. 2440 (1997) (discussing the 1997 SIJS Amendment). The text of the 1997 SIJS Amendment reads as follows:

- (j) an immigrant who is present in the United States –
  - (i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment;
  - (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien’s best interest to be returned to the alien’s or parent’s previous country of nationality or country of last habitual residence; and
  - (iii) in whose case the Attorney General expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status; except that –
    - (I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction; and
    - (II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act.

*Id.* The statute does not state any “*bona fide*” petition requirement, yet it is interpreted to deny SIJS applicants. In re Erick M., 820 N.W.2d 639, 647 (Neb. 2012).

<sup>140</sup> See SLOAN, *supra* note 129, at 5 (maintaining that congressional reports are non-binding sources of authority).

<sup>141</sup> See *id.* (declaring that congressional reports should receive less deference when compared to actual statutes). Secondary sources of authority do not control the outcomes of issues, especially when TVPRA 2008 is binding authority demonstrating an intent to depart from the 1997 SIJS Amendment. *Id.*

legislative history.<sup>142</sup> This reliance conflicts with Congress' deliberate replacement of terms like "long-term foster care" with "reunification with one or both parents is not viable."<sup>143</sup> A plain meaning approach to the current SIJS statute suggests that a child who cannot reunite with at least one parent due to abuse, neglect, or abandonment is eligible for SIJS.<sup>144</sup> This plain meaning analysis does not minimize a child's experiences based on discretion, but focuses on SIJS eligibility for a child victim.<sup>145</sup> Additionally, TVPRA 2008 is better tailored to the issues that SIJS applicants currently face.<sup>146</sup> Due to the increasing number of unaccompanied children entering the United States annually, the political concern is that children are in greater danger of becoming the victim of human trafficking and child endangerment.<sup>147</sup>

Though TVPRA 2008 advanced the limiting and restricting nature of the 1997 SIJS Amendment, the current statute still has its flaws: (1) the terms abuse, abandonment, and neglect are not defined; and (2) the "one or both" requirement is not clear, and thus allows for differing interpretations.<sup>148</sup> Since its enactment, legal scholars have advocated for uniformity in the terms abuse, abandonment, and neglect.<sup>149</sup> The current

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<sup>142</sup> See *infra* Part III.C.1 (discussing Nebraska's argument that TVPRA 2008's changes to the SIJS statute are ambiguous, thus the court is able to use the 1997 Congressional Report for guidance).

<sup>143</sup> See RUTH SULLIVAN, STATUTORY INTERPRETATION 49 (2d ed. 2007) ("In practice, the ordinary meaning is presumed to be the meaning intended by the legislature and, in the absence of a reason to reject it, it should be adopted by the court.").

<sup>144</sup> See JUNCK ET AL., *supra* note 4, at 3-4 ("[T]he statute appears to provide SIJS eligibility on the basis of the non-viability of reunification with one parent due to abuse, neglect or abandonment, even while the child remains in the care of the other parent or while the court is actively trying to reunite the child with the other parent.").

<sup>145</sup> See *Reno v. Flores*, 507 U.S. 292, 302-03 (1993) (acknowledging that lower courts have held that children have fundamental rights when dealing with government placement in immigration matters); *Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (weighing the states' competing interests in preserving and promoting the welfare of children and reduction in burden and cost to the state); *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 27 (1981) (observing the necessity for states to be accurate and just in the decisions made with children).

<sup>146</sup> See *supra* note 42 and accompanying text (conveying the political concern of visiting college students abusing SIJS 1990).

<sup>147</sup> See, e.g., David Gonzalez, *When American Dream Leads to Servitude*, N.Y. TIMES (Apr. 24, 2007), <http://www.nytimes.com/2007/04/24/nyregion/24citywide.html> [<http://perma.cc/R28K-JQT5>] (rendering the number of human trafficking victims in the United States is unascertainable); Gen. Charles C. Krulak, *A New Slavery, 150 Years Later*, HUFF. POST (Apr. 22, 2015), [http://www.huffingtonpost.com/charles-krulak/a-new-slavery-150-years-l\\_b\\_6713702.html](http://www.huffingtonpost.com/charles-krulak/a-new-slavery-150-years-l_b_6713702.html) [<http://perma.cc/6JB2-W43U>] (equating human trafficking for women and children as the new form of slavery).

<sup>148</sup> See *infra* Part III.C (discussing the New York and the Nebraska courts' analysis of the issues of TVPRA 2008 as a basis for different results).

<sup>149</sup> See Anderson, *supra* note 11, at 680 (advocating for uniformity in the terms abuse, abandonment, and neglect, and further guidance to the "[one] or both" requirement); *Special*

## 212 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 50]

system allows states to apply their own meanings; however, this does not create a critical issue in the SIJS process because states' definitions of abuse, abandonment, and neglect are similar.<sup>150</sup> The second issue is the failure of TVPRA 2008 to clarify the "[one] or both" requirement, which has allowed states to deem the statute ambiguous, and resulted in inconsistencies.<sup>151</sup> If the state applies a plain meaning reading to the current SIJS statute, the removal of the long-term foster care requirement demonstrates an intent to expand the pool of children eligible for SIJS.<sup>152</sup> However, if one narrowly construes the statute, TVPRA 2008 justifies the reliance on legislative history as a means to deny eligible children.<sup>153</sup> Therefore, TVPRA 2008 needs to be revised to address the ambiguity.<sup>154</sup>

*B. The Current SIJS Proposals are Inadequate in Ensuring the Best Interests of the Child*

The SIJS 2011 proposals were not adopted because they failed to clarify or further guide TVPRA 2008.<sup>155</sup> Similarly, President Obama's immigration plan is not narrowly tailored in addressing the needs of

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*Provisions for Immigrant Youth: A Model State Statute*, *supra* note 79, at 7 (proposing definitions to ambiguous terms in the current SIJS statute).

<sup>150</sup> Compare NEB. REV. STAT. § 28-705(3) (2015) ("When any person abandons and neglects to provide for his or her spouse or his or her child or dependent stepchild for three consecutive months or more, it shall be prima facie evidence of intent to violate" the abandonment of a child or dependent stepchild), with N.Y. SOC. SERV. LAW § 384-b(5)(a) (McKinney 2013), which sets out New York's abandonment definition as:

[A] child is "abandoned" by his parent if such parent evinces an intent to forgo his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency. In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed.

N.Y. SOC. SERV. LAW § 384-b(5)(a) (McKinney 2013).

<sup>151</sup> See Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1300-01 n.16 (1975) (arguing that the plain meaning may not be "plain" to everyone). In a second circuit opinion, Judge Learned Hand wrote that "there is no surer way to misread any document than to read it literally." *Id.* at 1301.

<sup>152</sup> See Wendy Biddle, *Let's Make a Deal. Liability for "Use of a Firearm" When Trading Drugs for Guns Under 18 U.S.C. § 924(C)*, 38 VAL. U. L. REV. 65, 94 n.182 (2003) ("[T]he plain meaning of the statute trumps the legislative intent.").

<sup>153</sup> See *supra* Part II.D.2 (considering Nebraska's narrow interpretation of SIJS to deny Erick's juvenile court order for relevant special findings).

<sup>154</sup> See Junck, *supra* note 8, at 56 (stating that a plain meaning reading of the SIJS statute reveals that the child is eligible for SIJS when "non-viability of reunification with one parent due to abuse, neglect, or abandonment, even while the child remains in the care of the other parent").

<sup>155</sup> See *supra* notes 73-74 and accompanying text (describing the failure of the SIJS 2011 proposals to advance the issues of TVPRA 2008).

undocumented children, because it addresses relief for millions of undocumented *adults and children* in the United States.<sup>156</sup> Further, President Obama's proposal brought backlash toward immigrants and a continuing lack of empathy for the millions of undocumented children.<sup>157</sup>

Representative Roby claims to understand the need for addressing undocumented children in the United States; however, her proposal merely lists immigration efforts that she feels should not be funded by Congress.<sup>158</sup> Nevertheless, Representative Roby's plan may have been purposefully introduced as a precursor for Representative Aderholt's proposal, which was released just days later.<sup>159</sup> Of particular importance, Section 302 of Representative Aderholt's "Repeal Executive Amnesty Act of 2015," proposes to change the "[one] or both" language in the current SIJS statute to "either of the immigrant's parents."<sup>160</sup> If this Act is adopted, the legislature will demonstrate a complete disregard of the trauma experienced by undocumented children in the custody of one parent.<sup>161</sup>

Having one parent present in a child's life does not mean that the child is protected from abuse, neglect, or abandonment.<sup>162</sup> Similarly, granting SIJS for the child has no bearing of citizenship for their parent or parents; but, denying a child because of the child's custody status guarantees the uncertainty of the child's future.<sup>163</sup> Instead, approving SIJS for the child ensures that despite what happens to that "present parent," the child could receive lawful permanent residency, saving them from abuse,

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<sup>156</sup> See Parlapiano, *supra* note 75 (reviewing President Obama's immigration plan to allow undocumented immigrants that have been present in the United States for five or more years to receive lawful permanent residency status).

<sup>157</sup> See Shabad & Marcos, *supra* note 79 (conveying that the House of Representatives passed a bill to defund President Obama's immigration plan).

<sup>158</sup> See Press Release, Roby, *supra* note 77 (analyzing Representative Roby's Prevention of Executive Amnesty Act of 2015). Representative Roby stated that President Obama's immigration plan is irresponsible, and urges the House not to support his plan. *Id.* The problem is that Representative Roby's proposal does not give a solution to the problem, but merely advocates against President Obama's plan. *Id.*

<sup>159</sup> See *supra* notes 77-78 (evaluating state representatives' immigration proposals).

<sup>160</sup> See *supra* note 78 and accompanying text (describing Representative Roby's proposal to the SIJS statute).

<sup>161</sup> See Junck, *supra* note 8, at 49 (stating that many undocumented children travel to the United States as an infant or young child, growing up nearly entirely in the United States and considering the United States as their only home). These children may experience severe conditions such as poverty, simply because their parents are undocumented. *Id.* at 49-50.

<sup>162</sup> See Thronson, *supra* note 16, at 61, 66-67 (revealing that immigrant children are more likely to experience poverty and barriers to public benefits than the average American child).

<sup>163</sup> See *supra* note 138 and accompanying text (confirming that the child's SIJS status does not confer any special privileges or benefits to the parents or other close relatives of the child).

214 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 50]

neglect, or abandonment.<sup>164</sup> The SIJS's intent is to protect the child from disastrous conditions, not to abandon that child because of fear of encouraging "illegal" immigration and pursuing deportations.<sup>165</sup>

Fordham Law School recognized the inadequacy of the current SIJS proposals and sent statements to the U.S. House of Representative Judicial Committee opposing efforts to narrowly interpret the SIJS statute.<sup>166</sup> In an attempt to rectify the problem, the Fordham Law School prepared a Model State Statute that proposes the use of uniformity and flexibility across state lines.<sup>167</sup> These combative efforts demonstrate the importance of creating legislation that considers the best interests of the undocumented child.<sup>168</sup> Similarly, other proposals from the U.S. House of Representatives and legal scholars highlight the need for reform in the current SIJS statute.<sup>169</sup>

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<sup>164</sup> See Junck, *supra* note 8, at 58 (determining that it is not in a child's best interest to be returned to his or her native country because some children have spent the majority of their lives in the United States, making them unfamiliar with the customs and language of their native country).

<sup>165</sup> See Lloyd, *supra* note 10, at 238–39 n.10 (discussing the division of INS in the SIJS process to protect the federal government's focus of national security and the state's role in deciding the best interests of the child).

<sup>166</sup> See Memorandum from Fordham Law School, *supra* note 79, at 1 (proclaiming that if the House votes to strike the "reunification with [one] or both parents" language, and inserts "who cannot be reunified with either of the immigrant's parents" the law will be taking a step backward in protecting vulnerable undocumented children). Additionally, Fordham argues that this action could create a greater wedge in integrated immigration efforts with the best interests of the child. *Id.* See also Memorandum from Safe Passage Project, *supra* note 53 (enunciating if the current SIJS statute were amended to restrict children in the custody of one parent SIJS eligibility, the government would be removing the children from the only safe place that the child has ever known, in the custody of that one parent).

<sup>167</sup> See *Special Provisions for Immigrant Youth: A Model State Statute*, *supra* note 79, at 6 (stating the inadequacy of current SIJS law which defers to state law on the child's best interest, but allows the USCIS to make final determinations).

<sup>168</sup> See *id.* (restating the purpose of SIJS to protect vulnerable children). Particularly, Section 502 of the model statute proposes the following guidelines for the "[one] or both parents" requirement:

- a. A Juvenile Court may make a Non-Reunification Finding without terminating any parental rights.
- b. A Juvenile Court shall make a Non-Reunification Finding when it determines that reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under State law, even when the Immigrant Youth is under the care of or may be able to reunite with the other parent.
- c. A Non-Reunification Finding for SIJS purposes can be made based on the acts or omissions of only one parent even when other state laws and/or other proceedings require a finding against both parents.

*Id.* at 12.

<sup>169</sup> See *infra* Part IV (proposing amendments to the current SIJS statute). Additionally, consent is a barrier for undocumented children, as the USCIS has usurped the role of the juvenile court in making final determinations for the best interests of the child. See *Kids Will Be Kids*, *supra* note 63, at 1013.

C. *The Literal Reading Approach: New York versus Nebraska*

Currently, state courts are divided as to how to apply the SIJS statute.<sup>170</sup> In *Erick M.*, Nebraska narrowly construed the SIJS statute, and limited the number of children eligible to petition the USCIS because Erick failed to state a “*bona fide*” claim.<sup>171</sup> This analysis is outside the statutory defined scope for juvenile courts in SIJS matters.<sup>172</sup> Scholars criticized the Nebraska decision because the court overstepped its statutorily defined role described in the SIJS statute.<sup>173</sup> Ultimately, the court denied Erick’s request for special findings because the court believed that Erick’s request was solely to achieve lawful permanent residency in the United States.<sup>174</sup> However, the state court cannot give consent in SIJS matters.<sup>175</sup> The state juvenile courts determine if the applicant meets the age, marriage, viability of reunification with “[one] or both” parents, and the “abuse, neglect, and abandonment” requirements.<sup>176</sup> Nebraska’s ruling is invalid because the court has no authority to grant consent that is statutorily delegated to the DHS.<sup>177</sup>

<sup>170</sup> See *supra* Part II.D.2 (analyzing the case, holding, and reasoning of two differing state interpretations of the SIJS statute).

<sup>171</sup> See *supra* Part II.D.2 (discussing Nebraska’s interpretation of the current SIJS statute).

<sup>172</sup> See *supra* note 145 and accompanying text (focusing on the SIJS eligibility of a child victim).

<sup>173</sup> See, e.g., 3-35 Immigration Law and Procedure § 35.09(3)(a) (Matthew Bender 2013) (“[T]he Nebraska court blurred the federal and state roles under the SIJ statute” which “has the troubling effect of precluding the USCIS from applying its interpretation of the federal statute to determine whether a youth would qualify in a particular case.”).

<sup>174</sup> Compare 58 Fed. Reg. 42847 (Aug. 12, 1993) (reiterating congressional intent for state juvenile courts to focus on the best interests of the child), with *In re Erick M.*, 820 N.W.2d 639, 648 (Neb. 2012) (denying Erick’s petition because he demonstrated that reunification with his mother was not feasible). In the opinion, the Nebraska court explained that the “USCIS will not consent to a petition for SIJ status if it was ‘sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect or abandonment.’” *In re Eric M.*, 820 N.W.2d at 646.

<sup>175</sup> See 8 U.S.C. § 1101(a)(27)(J)(iii) (2012) (“[I]n whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status.”).

<sup>176</sup> *Id.* See also Anderson, *supra* note 11, at 684 (arguing that Nebraska’s decision was influenced by outside factors). More specifically, “[t]he court’s decision was influenced by the fact Erick was removed from his mother’s house due to his own actions and the lack of apparent abuse or neglect from either of Erick’s parents.” *Id.*

<sup>177</sup> See 8 U.S.C. § 1101(a)(27)(J)(iii) (delegating authority to the Secretary of Homeland Security to grant consent of SIJS). A more sensible belief is that the court denied Erick’s request because he was in custody for possession of alcohol as a minor, and while in the rehabilitation center, he constantly attacked the staff. *Erick M.*, 820 N.W.2d at 642. State courts and USCIS immigration officials have discretion to deny immigration relief based on juvenile delinquency, which is what Nebraska should have done instead of ruling that Erick did not meet the statutory requirements. Junck, *supra* note 8, at 55. Juvenile delinquency is considered a serious adverse discretionary factor against that child in SIJS proceedings. *Id.*



## 216 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 50]

Additionally, the Nebraska Supreme Court minimized the effects that abandonment has on a child, regardless of whether one parent is still involved in the child's life.<sup>178</sup> The SIJS statute neither imposes a requirement that a particular parent has to abuse, neglect, or abandon the child, nor does the statute require a specific time frame for abuse, abandonment, or neglect by that parent, for a child to receive SIJS.<sup>179</sup> Ultimately, the court punished Erick for having at least one active parent in his life, which is contrary to the best interests of the child.<sup>180</sup> If the Nebraska Supreme Court would have taken a plain meaning approach to the SIJS statute, they would have found that Erick met the SIJS requirements.<sup>181</sup> A plain meaning approach to the statute would allow SIJS eligibility for Erick even though he remains in the care of his mother.<sup>182</sup>

In New York, the court determined that the children met the preliminary determination of "special findings" and could petition the USCIS for SIJS.<sup>183</sup> The New York Supreme Court correctly took a plain meaning approach to interpreting the SIJS statute because TVPRA 2008 demonstrates an intent by Congress to broaden the SIJS statute.<sup>184</sup> Even

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<sup>178</sup> See *Erick M.*, 820 N.W.2d at 647 (suggesting that consideration of reunification with the absent parent is not necessary when the child is in the custody of a safe parent).

<sup>179</sup> 8 U.S.C. § 1101(a)(27)(J). Additionally, in *David C.*, the Nebraska Supreme Court states that "[a]lthough § 43-104 specifies the 6 months preceding the filing of the petition as the critical period of time during which abandonment must be shown, we have stated that this statutory period need not be considered in a vacuum." *David C. v. Jerad F.*, 790 N.W.2d 205, 211 (Neb. 2010). This example illustrates Nebraska's flexibility with the statutory requirements, or lack thereof in *Erick M.* *Id.*

<sup>180</sup> See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457 § 253, 122 Stat. 5044 (amending the language of the current SIJS statute); *Erick M.*, 820 N.W.2d at 648 (ruling that because Erick failed to demonstrate that reunification with his mother was not feasible, he failed to meet the SIJS requirements).

<sup>181</sup> See 8 U.S.C. § 1101(a)(27)(J)(i) (listing the requirements for SIJS).

<sup>182</sup> See 3-35 Immigration Law and Procedure, *supra* note 173, at § 35.09(3)(a) (maintaining that Nebraska blurred the roles of the federal and state in deciding SIJS matters).

<sup>183</sup> *Marcelina M.-G. v. Israel S.*, 112 A.D.3d 100, 115 (N.Y. App. Div. 2013). See also *In re E.G.*, 2009 WL 2534556, at \*3 (N.Y. Fam. Ct. 2009) (ruling that TVPRA 2008 allows a child to petition the USCIS for SIJS even if there is a fit parent living abroad, so long as the minor has been abused, neglected or abandoned by one parent). *In re Mario S.* supports this interpretation holding that although the child could be returned to his mother, he was abandoned by his father. 954 N.Y.S.2d 843, 851 (N.Y. Fam. Ct. 2012). "The fact that respondent was returned to the care of his mother should not be determinative of his application for SIJ findings." *Id.*

<sup>184</sup> See *Plain Meaning Rule*, BLACK'S LAW DICTIONARY (10th ed. 2009) (defining the plain meaning rule: "[t]he doctrine that if a legal text is unambiguous it should be applied by its terms without recourse to policy arguments, legislative history, or any other matter extraneous to the text unless doing so would lead to an absurdity"). The plain meaning rule is derived from case law "where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words

the Nebraska Supreme Court agrees that TVPRA 2008's language demonstrates an expansion to the pool of eligible children for SIJS.<sup>185</sup> Further, immigration advocates believed that TVPRA 2008 ended the requirement that both parents had to be absent from the child's life to receive SIJS.<sup>186</sup> Therefore, New York correctly interpreted the SIJS statute as expanding the number of children eligible to receive SIJS.<sup>187</sup>

The New York Supreme Court's interpretation of the current SIJS statute is correct because it solely analyzed the statutorily defined factors assigned to juvenile courts in the SIJS process.<sup>188</sup> The state's role is to focus on the best interests of the child, and determining whether the child stated a "*bona fide*" claim distorts that purpose.<sup>189</sup> Additionally, the New York Supreme Court understood that children seeking United States' relief is a humanitarian crisis, and a child should not be denied because of fear that the child is abusing the SIJS remedy.<sup>190</sup> The fear of abuse is not relevant to this time period, considering the increasing number of undocumented children entering the United States annually.<sup>191</sup>

Further, the New York Supreme Court recognizes that a child's ability to be reunited with one parent does not guarantee that the child will be

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employed are to be taken as the final expression of the meaning intended." *Id.* See also CHRISTO BOTHA, STATUTORY INTERPRETATION: AN INTRODUCTION FOR STUDENTS 28 (4th ed. 2005) (discussing the purpose of plain language drafting to convey ideas in a simple manner).

<sup>185</sup> See *Erick M.*, 820 N.W.2d at 645 (interpreting TVPRA 2008 as an expansion to the pool of children able to receive SIJS).

<sup>186</sup> See *Lee et al.*, *supra* note 60, at 3 (describing that "[t]he plain language of this statutory revision says that family reunification need only be 'not viable' with one parent, not both parents").

<sup>187</sup> See *Marcelina M.-G.*, 112 A.D.3d at 110 ("We interpret the '[one] or both' language to provide SIJS eligibility where reunification with just one parent is not viable as a result of abuse, neglect, abandonment, or a similar state law basis"). Further, the court notes that the "possibility of reunification with one parent does not bar SIJS eligibility." *Id.*

<sup>188</sup> See 8 U.S.C. § 1101(a)(27)(J) (2012) (reaffirming that the state juvenile court's role is to determine whether it is in the child's best interest to return to his or her native country). This analysis is based on the question, whether "reunification with [one] or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law." *Id.*

<sup>189</sup> See 58 Fed. Reg. 42847 (Aug. 12, 1993) (explaining congressional intent for state juvenile courts' best interest determinations to be the final adjudication needed to determine SIJS); *supra* Part II.D.2 (explaining the statutorily assigned role of the state government in the SIJS process). Congress separated the roles in the SIJS process to allow states to determine the best interests of the child, and the USCIS to grant consent. 58 Fed. Reg. 42847 (Aug. 12, 1993).

<sup>190</sup> See *Lloyd*, *supra* note 10, at 243 (recognizing the major concern during the 1997 SIJS Amendments was abuse by students who wanted to attend American colleges and universities).

<sup>191</sup> See *Junck*, *supra* note 8, at 50 (communicating TVPRA 2008's intent to provide protection to the thousands of unaccompanied minors that enter the United States annually).

## 218 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 50]

adequately provided for without a valid form of U.S. citizenship.<sup>192</sup> Even if a child can be reunited with one parent, the child needs documentation to access benefits such as health care and social services.<sup>193</sup> By granting undocumented children the right to free public education, the U.S. Supreme Court recognized the lack of empathy for undocumented children in the United States.<sup>194</sup> The New York Supreme Court comprehended the fact that allowing the child to receive “special findings” to petition the USCIS for SIJS does not confer any special benefits to the child’s parents.<sup>195</sup> Granting an undocumented child SIJS will not give the parent legal status in the United States, but denying a statutorily eligible undocumented child because he or she can be released into the custody of one parent, punishes the child for the parent’s decision of traveling to the United States.<sup>196</sup> New York’s analysis of the SIJS statute is correct because it focuses on the best interest of the child and does not punish the child for their parents’ decisions.<sup>197</sup>

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<sup>192</sup> See Thronson, *supra* note 16, at 69 (recognizing that undocumented children face a number of challenges in the current immigration scheme because every aspect of undocumented children’s rights are determined by their parents). This demonstrates a lack of agency for undocumented children, often having their interest ignored in immigration law purporting to be in the child’s best interest. *Id.*

<sup>193</sup> See Junck, *supra* note 8, at 49–50 (disclosing that undocumented children are less likely to have health insurance, and more likely to encounter barriers to accessing public benefits); Thronson, *supra* note 16, at 77–78 (evaluating the barriers that undocumented children face due to their parents decision to travel to the United States without proper documentation).

<sup>194</sup> See, e.g., *Plyer v. Doe*, 457 U.S. 202, 230 (1982) (“If the state is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest.”). The case derived from a Texas School Board decision to exclude children from public schools if they could not establish that they were legally admitted to the United States. *Id.* at 206. The Court recognized that the children were innocent bystanders and should not be subject to discrimination. *Id.* at 230. However, the dissent argues that it is not the job of the Court to remedy every social ill and failings of the political system. *Id.* at 253 (Harlan, J., dissenting).

<sup>195</sup> See 8 U.S.C. § 1101(a)(27)(f)(iii)(II) (2012) (stating that “no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter”); Mai, *supra* note 36, at 253 (reasserting that that parents, siblings, or family members cannot collaterally benefit from a relative receiving SIJS).

<sup>196</sup> See *supra* note 192 and accompanying text (revealing the undocumented child’s lack of agency in immigration matters despite the alleged best interest focus).

<sup>197</sup> See *Marcelina M.-G. v. Israel S.*, 112 A.D.3d 100, 115 (N.Y. App. Div. 2013) (determining that it would not be in the child’s best interest to be returned to their native country); see also *supra* note 41 and accompanying text (confirming the purpose of vesting state courts with the power to make preliminary SIJS determinations).

In *Marcelina*, reunification with the children's mother did not preempt the court from ruling the children met the SIJS statutory requirements.<sup>198</sup> Additionally, the *Marcelina* court recognized the difference in statutory interpretation and rightfully criticized the *Erick M.* court for its narrow interpretation.<sup>199</sup> First, the New York Supreme Court reasoned that even if the Nebraska Supreme Court found the statute ambiguous, the federal statutory construction requires the ambiguity to be read in favor of the immigrant child, which the Nebraska court failed to do.<sup>200</sup> Second, the New York Supreme Court critiqued the Nebraska Supreme Court's failure to consider the dangers that Erick will face as a result of being deported to his native country and away from his fit parent.<sup>201</sup> Ultimately, the New York Court placed the best interests of the child in its analysis while the Nebraska Court failed to consider the best interests of Erick.<sup>202</sup>

The Nebraska Supreme Court's interpretation is deeply flawed and does not account for the best interests of the child.<sup>203</sup> Considering this issue, this Note proposes a definitive standard to guide the states in using New York's approach as a guideline and to minimize outcome disparities.<sup>204</sup> Amending ambiguous terms in the current SIJS statute will

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<sup>198</sup> *Marcelina M.-G.*, 112 A.D.3d at 115. The court analyzed the abandonment from the children's father and allowed SIJS even though the mother petitioned the court for sole custody and a SIJS juvenile court order. *Id.* at 114. In both *Erick M.* and *Marcelina*, the children had a suitable mother upon which the court could release them into safe and stable custody. Compare *In re Erick M.*, 820 N.W.2d 639, 648 (Neb. 2012) (denying Erick's petition because his mother was an active part of his life and present during the judicial proceedings, although she did not petition the court), with *Marcelina M.-G.*, 112 A.D.3d at 115 (granting the motion to petition the USCIS even though the child's mother petitioned the court for special findings of SIJS eligibility).

<sup>199</sup> See *Marcelina M.-G.*, 112 A.D.3d at 112–13 (critiquing the Nebraska Supreme Court for making determinations beyond the scope of juvenile courts in the SIJS application process).

<sup>200</sup> See *id.* (explaining the purpose of ruling statutory ambiguities in favor of the child immigrant); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (supporting flexibility in ambiguous immigration statutes that have the potential of deporting the immigrant into a dangerous environment); *Yu v. Brown*, 92 F.Supp.2d 1236, 1248 (D.N.M. 2000) (ruling that ambiguities within immigration statutes must be interpreted in favor of the immigrant).

<sup>201</sup> *Marcelina M.-G.*, 112 A.D.3d at 113. The court weighs the alternative of granting special findings which is to "render[] the fact that the child has a fit parent in the United States immaterial." *Id.*

<sup>202</sup> See *Anderson*, *supra* note 11, at 692 (concluding that Erick was punished for finding "stability" with his mother after his father abandoned him at the age of one). *Anderson* also writes that the Nebraska Supreme Court was influenced by the fact that Erick was in rehabilitation for his own actions and not as a direct result of abuse from his parents. *Id.* at 684. This view fails to consider the effect that the abandonment from Erick's father has contributed to his current mental state. *Id.*

<sup>203</sup> See *supra* notes 39 & 41 and accompanying text (stating the purpose of dividing the SIJS process to ensure that national security concerns do not trump the best interests of the child).

<sup>204</sup> See *infra* Part IV (proposing an amendment to the SIJS statute to clarify the ambiguities and remove the need to rely on the 1997 Congressional Report).

decrease reliance on the limiting and restricting nature of the 1997 SIJS Amendment.<sup>205</sup> Additionally, there is no provision in the actual statute that encourages denial of SIJS because of a non *bona fide* claim.<sup>206</sup> Further, the 1997 Congressional Report is persuasive, non-binding authority, while the SIJS statute is primary mandatory authority.<sup>207</sup> Allowing state courts and the USCIS to rely on this form of legislative history conflicts with the purpose of TVPRA 2008. The focus of SIJS should be on the victim and not political views of a distant Congress.<sup>208</sup>

#### IV. CONTRIBUTION

Jurisdictional splits, such as the one presented above, are detrimental to the notions of fairness, trust, and equality in the judicial system.<sup>209</sup> This inconsistent application of SIJS must be resolved to minimize the outcome disparities for SIJS applicants.<sup>210</sup> Part IV.A introduces the proposed SIJS amendments.<sup>211</sup> Then, Part IV.B includes commentary to the suggested amendments.<sup>212</sup>

##### A. Guideline Amendments: *SIJS Revised to Comply with New York's Plain Meaning Interpretation*

New York utilizes the plain meaning standard for granting “special findings” to SIJS applicants.<sup>213</sup> This uniform standard is the best choice given the necessary balancing of the inherent strengths and weaknesses of both standards.<sup>214</sup> Due to TVPRA 2008’s amendment to the language of the SIJS statute, statutory construction and interpretation issues will

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<sup>205</sup> See *supra* Part II.B (reviewing 1997 SIJS Amendment with respect to the political concerns).

<sup>206</sup> See *supra* Part III.A (comparing TVPRA 2008 to the limiting and restricting nature of the 1997 SIJS Amendment, specifically the 1997 Congressional Report).

<sup>207</sup> See *supra* Part III.A (explaining the legal effect of primary and mandatory authority).

<sup>208</sup> See *supra* Part II.D.2 (considering the different outcomes derived from the same SIJS statute in the current scheme).

<sup>209</sup> See *supra* Part III.C (demonstrating the effect of differing statutory interpretations).

<sup>210</sup> See *supra* Part II.D.2 (demonstrating the outcome disparities for similarly situated children in different states).

<sup>211</sup> See *infra* Part IV.A (proposing amendments to the “[one] or both” requirement and providing uniformity in the terms abuse, neglect, and abandonment).

<sup>212</sup> See *infra* Part IV.B (explaining the importance of the suggested amendments from Part IV.A).

<sup>213</sup> See *supra* note 124 and accompanying text (describing the states with different statutory interpretations of the SIJS statute and the varying outcome of the interpretations).

<sup>214</sup> See *supra* Part III.C (contesting the plain meaning approach taken by the New York Supreme Court).

continue.<sup>215</sup> The courts and the USCIS should attempt to give the words their full effect, as they were deliberately inserted by Congress.<sup>216</sup> Thus, a plain meaning approach is the best choice; however, because the plain meaning is not “plain” to everyone, the current SIJS statute should be amended to conform to the New York Supreme Court’s current statutory interpretation.<sup>217</sup>

The SIJS statute, 8 U.S.C. § 1101(a)(27)(J), should first be amended to clarify the meaning of “[one] or both.” Second, the revised SIJS statute should add definitions to “neglect,” “abuse,” and “abandonment” to direct courts to focus on the intent of the legislature in expanding the pool of applicants eligible for the benefit. The language of the proposed statute is as follows:

(J) An immigrant who is present in the United States –

- (i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with [one] or both of the immigrant’s parents, *even if the child can be reunited with the other parent*, is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;

(I) *Definitions for State Uniformity*

(a) *Abuse – Abused child means a child less than eighteen years of age whose parent or other person legally responsible for his or her care: (1) Inflicts or allows to be inflicted upon such child mental or physical injury by other than accidental means that causes or creates a substantial risk of death, serious or protracted disfigurement, protracted*

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<sup>215</sup> See *supra* Part III.C (debating Nebraska’s interpretation that the current SIJS statute allows courts to decide if they want to determine the best interests of the child in the context of “[one] or both” parents).

<sup>216</sup> See *supra* Part III.A (analyzing the replacement of the “long-term foster care” requirements with the “[one] or both” parents language).

<sup>217</sup> See *supra* note 149 and accompanying text (explaining the problem with the plain meaning approach). Everyone does not view the statute in the same “plain” way. *Id.*

*impairment of physical or emotional health, or protracted loss or impairment of the function of any bodily organ; or (2) Creates or allows to be created a substantial risk of mental or physical injury to such child by other than accidental means that would be likely to cause death, serious or protracted disfigurement, protracted impairment of physical or emotional health, or protracted loss or impairment of the function of any bodily organ.*

*(b) Neglect – Neglected child means a child less than age eighteen whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his or her parent or other person legally responsible for his or her care to exercise a minimum degree of care: (1) In supplying the child with adequate food, clothing, shelter, education, or medical or surgical care, although financially able to do so or offered financial or other reasonable means to do so; (2) In providing the child with proper supervision or guardianship; (3) By unreasonably inflicting or allowing harm to be inflicted, or a substantial risk thereof, including the infliction of excessive corporal punishment; (4) By misusing drugs or alcoholic beverages to the extent that he or she loses self-control of his or her actions; or (5) By any other acts of a similarly serious nature requiring the aid of the court.*

*(c) Abandonment – A child is abandoned by his parent if such parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency. In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed.<sup>218</sup>*

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<sup>218</sup> The state law definition was taken from New York's Social Services. N.Y. SOC. SERV. LAW § 371 (4)(a)–(b), § 384-b (5)(a) (2012).

- (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and
- (iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that –

(I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and

(II) no natural parent or prior adoptive parent of any alien *provided* special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.<sup>219</sup>

#### B. Commentary

TVPPRA 2008 should first be amended to clarify that having one parent present does not preclude the child from being the victim of abuse, neglect, or abandonment.<sup>220</sup> Children should not be punished for having only one active parent in their life, and further explaining the “[one] or both” language will prevent this problem. Though the “[one] or both” language arguably causes differing interpretations amongst the states, since each state has different definitions of abuse, abandonment, and neglect, the statute should provide definitions for all of those terms to create uniformity in application of the SIJS statute.<sup>221</sup> By amending the language to address these differences in definitions and state interpretations, the guidelines will set forth a uniform standard for state

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<sup>219</sup> 8 U.S.C. § 1101(a)(27)(J) (2012); the italicized portion of the statute is the contribution of the author.

<sup>220</sup> See *supra* Part III.B (discussing the detrimental effects on children enduring the current SIJS process, dependent upon the state where the child is located).

<sup>221</sup> See *supra* Part III.C (demonstrating the inadequacy of allowing states to defer to their own definitions and interpretations for the SIJS statute).



224 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 50]

juvenile courts.<sup>222</sup> This standard properly focuses on the negative impacts of permitting differing state interpretations of the same language, and thus will aid courts in alleviating those harms through allowing eligible children to petition the USCIS for SIJS.<sup>223</sup> Mandating this standard will help ensure that courts no longer apply inconsistent standards across jurisdictions, resulting in outcome disparities.<sup>224</sup>

Critics will argue that the proposed amendment will fail because the language “[one] or both” can be reasonably interpreted to mean that state courts have discretion in determining that if the child is in the custody of one fit parent, the abandonment, abuse, or neglect of the missing parent is irrelevant. The proposed amendment addresses this argument because the application of a consistent standard will dramatically decrease disparity and better achieve the goals of ensuring that all children asking family courts for special findings to petition the USCIS for SIJS are treated equally.<sup>225</sup>

Additionally, critics will argue that state courts should have discretion in deciding if a child meets SIJS requirements. This criticism is flawed because the proposed amendment allows courts to determine if the child meets the current SIJS requirements, without overstepping their boundaries and making decisions statutorily granted to the USCIS. The USCIS has the power of consent, and state courts analysis should focus on determining if the applicant has been abused, abandoned, or neglected.<sup>226</sup>

## V. CONCLUSION

Following Congress’ departure from the long-term foster care standard articulated in the 1997 SIJS Amendment, state courts use wide discretion in interpreting the intent of Congress. In doing so, courts fail to effectuate the purposes underlying the SIJS statute and effectively combat the abuse, abandonment, and neglect that these children experience. In applying the varying “[one] or both” standards, courts created outcome disparities between similarly situated children, which is contrary to the SIJS goals of uniformity. To solve this continuing issue in SIJS statutory interpretation, the SIJS statute must undergo further amendment to create a uniform standard. Defining abuse, neglect, and abandonment, and

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<sup>222</sup> See *supra* Part IV.A (proposing guidelines to assist state juvenile courts in determining SIJS eligibility).

<sup>223</sup> See *supra* Part III.B (discussing the issues of allowing differing state interpretations).

<sup>224</sup> See *supra* Part III.B (explaining the harm done to Erick as a result of the state lacking uniformity in applying the SIJS statute).

<sup>225</sup> See *supra* Part III.B (displaying the disparities in application of the current SIJS statute).

<sup>226</sup> See *supra* Part II.C–D (describing the current SIJS process and the roles of the state and federal court).

further clarifying the “[one] or both language” will ensure uniformity among the states.

Applying this proposed amendment to the two brothers from Guadalajara would change the course of the brothers’ future. If there was a uniform standard, the fact that the boys could be reunited with their father would not preclude the Nebraska court from granting them special findings for SIJS. Nebraska would stay within its statutorily defined role of making a preliminary determination, and the brothers would have the chance to petition the USCIS for SIJS. Thus, the proposed amendment will ensure equal treatment for similarly situated children and minimize unwarranted disparities.

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